INDIANA EDUCATION EMPLOYMENT RELATIONS BOARD

ANNUAL REPORT

2001

THE HONORABLE FRANK O'BANNON
Governor of the State of Indiana

Members of the General Assembly

The Indiana Education Employment Relations Board presents its 29th annual report.

This report covers all official transactions of the agency under Public Law 217, Acts of 1973, as amended, for the calendar year 2001.

Dennis P. Neary, Chairman

John E. Lillich, Member

William E. Wendling, Jr., Member

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Maureen R. Johnson, Administrative Assistant
Tammie E. Welker, Accountant
Lisa K. Day, Secretary

DIVISION OF EDUCATION EMPLOYMENT RELATIONS

Ivan Floyd, Labor Relations Specialist
Janet L. Land, Labor Relations Specialist
Vicki E. Martin, Labor Relations Specialist
Joseph A. Ransel, Jr., Labor Relations Specialist
K. Patrick Weinmann, Labor Relations Specialist
MaryAnn Stuart, Secretary

DIVISION OF RESEARCH

Joseph A. Ransel, Jr., Director
Jackqualine J. Fenton, Secretary
Intern

BOARD MEETING

DATE: Tuesday, December 12, 2000
TIME: 10:30 a.m.
PLACE: Indiana Government Center North
100 North Senate Avenue, Room N 1045
Indianapolis, Indiana 46204-2220

MINUTES

Chairman Dennis P. Neary called the meeting to order at 10:35 a.m. Board Members William E. Wendling, Jr. and John E. Lillich were present. There was no official court reporter for this meeting.

Chairman Neary made a motion to approve the minutes of the meeting of July 19, 2000, as written. Member Lillich seconded the motion. The minutes were approved by all members.

IEERB Staff Member Ivan Floyd presented the following update on the litigation cases that are on appeal:

Marion CSC

IEERB IS NOT A PARTY IN THIS CASE

Transferred to Supreme Court. Awaiting Court's ruling. (A clerk contacted Mr. Floyd for assistance in locating case law which may be applicable.) [Teachers sued for breach of duty of fair representation and sued School for breach of contract. Change in early retirement package.]

Crawfordsville CS

Two separate cases being reviewed together

Montgomery Circuit Court. Judge Milligan has case under advisement. 1/14/00, Table of Authorities filed. [Refusal to discuss drug policy and interference with school employees in their 6(a) rights.]

South Newton CSC

Marion Superior Court. Trial court rendered decision. Based on record, briefs, and oral presentations of parties; Court entered judgment in favor of Association. Remanded case to IEERB for further proceedings. (Appeal of decision may be pending.) [Make-up of two waived student snow days.]

IEERB Research Director Joseph A. Ransel, Jr., gave the following contract settlement reports: This is the final report, having received 290 contracts in the office, for 1999-00. Of the 290 contracts received by IEERB, the average without increment is 3.44%; 6.20% with increment. Mr. Ransel also announced there are currently 232 settlements for the 2000-01 year, leaving 74 unsettled. Of the 182 contracts received by IEERB, the average without increment is 3.37%; 6.15% with increment.

Chairman Neary introduced IEERB's newest Labor Relations Specialist, K. Patrick Weinmann and welcomed him to the staff. Chairman Neary recognized Mr. John Webb, who is working with the Indiana Federation of Teachers.

Chairman Neary announced the next tentative Board meeting would be mid-February, as there was nothing currently pending before the Board.

There being no further business, the meeting adjourned at 10:55 a.m.

Dennis P. Neary, Chairman

IEERB BOARD MEETING

DATE: Wednesday, April 18, 2001
TIME: 10:00 a.m.
PLACE: Indiana Government Center North
100 North Senate Avenue, Room N 1045
Indianapolis, Indiana 46204-2220

AGENDA

1. Approval of minutes of December 12, 2000, meeting.
2. Report of the Director of Research on the 2000-01 negotiated settlement progress and state average.
3. Report of IEERB Staff member on litigation.
4. Hearing on **Petition For Emergency Interlocutory Order** in **RANDOLPH EASTERN CLASSROOM TEACHERS ASSOCIATION, et al., and BOARD OF SCHOOL TRUSTEES OF RANDOLPH EASTERN SCHOOL CORPORATION**, Case No. U-01-04-6835.
5. New business.
6. Public comment.

ANNOUNCEMENT

THE BOARD MEETING ORIGINALLY SCHEDULED FOR WEDNESDAY, APRIL 18, 2001, HAS BEEN CANCELLED.

NOTICE WILL BE MAILED REGARDING THE NEXT BOARD MEETING.

IEERB BOARD MEETING

DATE: Wednesday, August 22, 2001
TIME: 10:00 a.m.
PLACE: Indiana Government Center North
100 North Senate Avenue, Room N 1045
Indianapolis, Indiana 46204-2220

AGENDA

1. Approval of minutes of December 12, 2000, meeting.
2. Report of the Director of Research on settlement progress and state average.
3. Report of IEERB Staff member on litigation.
4. New business.
   Readopt IEERB's rules, 560 IAA 2
5. Public comment.

INTEREST-BASED COLLECTIVE BARGAINING

The Indiana Education Employment Relations Board ["IEERB"] ventured into interest-based bargaining training approximately four years ago at the joint request of a school employee organization and the school employer. After consulting with the Federal Mediation and Conciliation Service ["FMCS"], we outlined and executed our first training program. Since that time we have held training sessions at Fayette County (Connersville), Gary, Garrett-Keyser-Butler, DeKalb Central, and DeKalb Eastern.

Interest-based bargaining, referred to as IBB, has been a successful alternative to traditional bargaining in the private sector for several years and in the public sector for the past few years. IBB is also known as "win-win" bargaining, collaborative bargaining, or consensus bargaining. IBB is the brain child of Dr. Jerome T. Barrett and a favorite child of the FMCS.[1] IBB embraces the P.A.S.T. model for win-win bargaining. P.A.S.T. is an acronym for principles, assumptions, steps, and techniques.

Principles

- ➜ Focus on issues, not on personalities.
- ➜ Focus on interests, not on positions.
- ➜ Seek mutual gain.
- ➜ Use a fair method to determine outcome.

Assumptions

- ➜ Bargaining enhances the parties' relationship.
- ➜ Both parties can win in bargaining.
- ➜ Parties should help each other win.
- ➜ Open and frank discussion and information sharing expands the areas of mutual **interests**, and this in turn expands the **options** available to the parties.
- ➜ Mutually developed **standards** for evaluating **options** can move decision making away from reliance on power.

Steps

- ➜ Pre-Bargaining Steps:
- • Prepare for bargaining.
- • Develop opening statements.
- ➜ Bargaining Steps:

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[1] Dr. Barrett has worked for the National Labor Relations Board, the U. S. Department of Labor, and the American Arbitration Association. In 1989 he developed the P.A.S.T. model of win-win bargaining and a training program to help labor and management negotiators use the model. He has trained several FMCS mediators and others on how to conduct that training and facilitate interest-based negotiations.

- Agree on a list of **issues**.
- Identify **interests** on one **issue**.
- Develop **options** on one **issue**.
- Create acceptable **standards**.
- Test **options** with **standards** to achieve a **solution** or **settlement**.

Techniques

➜ Idea Charting
➜ Brainstorming
➜ Consensus Decision Making

Prior to any IBB training, IEERB representatives meet with the parties to determine interest and commitment. Preferably, the meeting occurs in an informal setting such as a restaurant for lunch or after school snack. If the parties wish to pursue IBB training, they must set aside the equivalent of two days. The only expenditures are those of facility, food, drink, and a few supplies. The agenda includes instruction in active listening skills, videos, communication exercises, traditional versus non-traditional bargaining styles, P.A.S.T. bargaining steps with exercises, consensus building and brainstorming exercises, and a simulation exercise utilizing the IBB approach to bargaining.

The IEERB emphasizes that IBB negotiations are not intended to replace traditional bargaining. Instead, IBB is an alternative approach to traditional collective bargaining. The IEERB recognizes that many school employee organizations and school employers are already using parts of IBB. In fact, many of the IBB techniques can be applied to traditional bargaining, other types of negotiations, and group decision-making endeavors. IBB is another service the IEERB provides to schools and their school employees to promote harmony in the collective bargaining process.

UNIT DETERMINATION AND REPRESENTATION

Six unit determination and representation cases were filed with the IEERB during the calendar year 2001. No elections were conducted by the IEERB in 2001.

UNIT DETERMINATION AND REPRESENTATION TABLE

	SCHOOL CORPORATION	CASE NUMBER	COUNTY	DISPOSITION
	2001 UNIT DETERMINATION AND REPRESENTATION CASES			
1.	Eastern Greene	R-01-01-2940	Greene	Unit Clarification/ Withdrawn
2.	Gary	R-01-02-4690	Lake	Unit Clarification/Pending
3.	Highland	R-01-03-4720	Lake	Unit Amendment/Withdrawn
4.	Mill Creek	R-01-04-3335	Hendricks	Unit Clarification/Withdrawn
5.	South Newton	R-01-06-5995	Newton	Election/Pending
6.	Union County	R-01-05-7950	Union	Unit Clarification/Pending

CONCILIATION

There were 306 teacher bargaining units in 2001. Of the 306 units, 74 did not bargain new contracts for the 2001-02 school year because they had reached multi-year agreements in previous year(s). On December 31, 2001, four 2000-01 bargaining tables remained at impasse.

Mediation is generally the first step in the impasse procedure under Public Law 217. If necessary, fact-finding with advisory recommendations may follow mediation. When a fact-finder's written recommendations are submitted to the IEERB, the report is released to the public through the media within ten days if the contract dispute is not resolved. If an impasse remains after completion of the fact-finding process, the IEERB may provide further mediation or fact-finding, as it deems appropriate.

FACT-FINDING

The IEERB no longer prints fact-finding reports in the Annual Report. There were no fact-finding reports issued in 2001.

Copies of fact-finding reports may be obtained at the state-approved charge for copying, through the IEERB, which maintains copies of fact-finding reports in its library.

The IEERB maintains a log of conciliation cases from 1974 through the present. We can furnish to negotiators a list of mediation and fact-finding cases for a particular school corporation or for a particular mediator or fact-finder. Requests for this information should be directed to the IEERB Research Division.

UNFAIR PRACTICE CASES

During the 2001 calendar year, twenty (20) unfair practice complaints were filed with the IEERB. On December 31, 2001, fifteen (15) unfair practice complaints were pending, up from nine (9) one year before. Full-time agency staff processed all of the 2001 cases.

2001 UNFAIR PRACTICE COMPLAINTS

	SCHOOL CORPORATION	CASE NUMBER	COUNTY	DISPOSITION
1.	Anderson	U-01-16-5275	Madison	Pending
2.	Bartholomew	U-01-01-0365	Bartholomew	Dismissed
3.	Carmel Clay	U-01-12-3060	Hamilton	Pending
4.	Carmel Clay	U-01-15-3060	Hamilton	Pending
5.	Crawfordsville	U-01-18-5855	Montgomery	Pending
6.	Dewey Twp.	U-01-11-4790	LaPorte	Pending
7.	East Chicago	U-01-07-4670	Lake	Pending
8.	Franklin Twp.	U-01-20-5310	Marion	Pending
9.	Lafayette	U-01-13-7855	Tippecanoe	Pending
10.	New Prairie	U-01-14-4805	LaPorte	Pending
11.	Northern Wells	U-01-06-8435	Wells	Pending
12.	Pike Twp.	U-01-19-5350	Marion	Pending
13.	Randolph Eastern	U-01-04-6835	Randolph	Dismissed
14.	Randolph Eastern	U-01-10-6835	Randolph	Dismissed
15.	South Bend	U-01-17-7205	St. Joseph	Pending
16.	Southwestern Jefferson	U-01-05-4000	Jefferson	Pending
17.	Union Randolph	U-01-02-6795	Randolph	Dismissed
18.	Union Twp.	U-01-08-6530	Porter	Dismissed
19.	Western Howard	U-01-03-3490	Howard	Dismissed
20.	Western Howard	U-01-09-3490	Howard	Pending

2000 UNFAIR PRACTICE COMPLAINTS

	SCHOOL CORPORATION	CASE NUMBER	COUNTY	DISPOSITION
1.	Boone Township	U-00-13-6460	Porter	Dismissed
2.	Crown Point	U-00-08-4660	Lake	Pending
3.	Eastern Greene	U-00-12-2940	Greene	Dismissed
4.	Goshen	U-00-03-2315	Elkhart	Decision
5.	Greensburg	U-00-10-1730	Decatur	Dismissed
6.	Knox	U-00-09-7525	Starke	Dismissed
7.	North Lawrence	U-00-11-5075	Lawrence	Dismissed
8.	Northern Tipton	U-00-01-7935	Tipton	Dismissed

BEFORE THE INDIANA EDUCATION EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

PROFESSIONAL EDUCATORS OF PORTER COUNTY, Local 4852, AFT, et al.,	)	
Complainants,	)	
and	)	Case No. U-00-13-6460
BOARD OF SCHOOL TRUSTEES OF THE M.S.D. OF BOONE TOWNSHIP,	)	
Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS COMPLAINT

The Respondent, Board of School Trustees of the M.S.D. of Boone Township, by counsel, filed a Motion to Dismiss Petitioners' Complaint for Unfair Practice.

RULING

The Federation's right to engage in a grievance procedure arises pursuant to a contract. On the other hand, the Federation's right to prosecute an unfair practice arises pursuant to state statute. A common law contract proceeding and a statutory unfair proceeding are two separate and distinct processes, at least in this instance, which are not interrelated. Consequently, the Federation has no obligation to exhaust its common law contract remedy prior to initiating an unfair practice complaint pursuant to state statute.

Of equal import, under the Federal Law, the National Labor Relations Board, in unfair labor practice cases, has chosen to defer to arbitration proceedings brought pursuant to the parties' collective bargaining agreement. Conversely, the Indiana Education Employment Relations Board has consistently declined to defer to proceedings brought under the parties' contractual grievance provision.

For the two above-stated reasons, the Hearing Examiner now DISMISSES the Respondent's motion to dismiss the complaint.

Dated this 14th day of February, 2001.

Ivan Floyd
Hearing Examiner

BEFORE THE INDIANA EDUCATION EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

PROFESSIONAL EDUCATORS OF PORTER COUNTY, Local 4852, AFT, et al.,	)	
Complainants,	)	
and	)	Case No. U-00-13-6460
BOARD OF SCHOOL TRUSTEES OF THE M.S.D. OF BOONE TOWNSHIP,	)	
Respondent.	)	

ORDER OVERRULING RESPONDENT'S MOTION TO RECONSIDER RESPONDENT'S MOTION TO DISMISS

The Respondent, Board of School Trustees of the MSD of Boone Township, filed a Motion to Reconsider the Respondent's Motion to Dismiss Petitioners' Complaint for Unfair Practice.

RULING

In most instances, in the context of public school collective bargaining, a teachers' organization's recourse in a dispute involving the meaning and implementation of the parties' collective bargaining agreement would be solely contractual in nature. For example, a school corporation and its teachers' organization may have agreed to establish a grievance procedure under which the teachers' organization could allege that certain school corporation action violated the parties' contract. In such an instance, if the parties' dispute were limited, for example, to the appropriate interpretation to assign to a particular sentence in the contract and to whether the School Corporation implemented that contractual provision, the teachers' organization's sole recourse would be to challenge the school corporation's interpretation and implementation of the provision in issue by exhausting the various steps in the parties' contractual grievance procedure.

However, in a few situations concerning teacher collective bargaining, the teachers' organization may also have a statutory right to seek redress by filing and prosecuting an unfair practice complaint. The present situation presents just such a case: that is, a case which contains both a contract claim (under common law) and an unfair practice claim (under state statutes).

ISSUE PRESENTED FOR RECONSIDERATION

The Respondent aptly summarizes its objection to the Hearing Examiner's ruling on the original Motion to Dismiss Petitioners' Complaint, stating:

> ... the Complaint filed by the Complainants speaks only to the contract wherein the central issue is whether or not the superintendent attended a meeting required by the contract. There is no other issue.

However, the issue described above is not the issue raised in the Complaint. Essentially, the Complainants claim that the School Corporation has engaged in conduct which would demonstrate that the School Corporation unqualifiedly repudiated the parties' collective bargaining agreement (by taking unilateral action) in regard to who would be the School Corporation's principal representative in statutory discussion. Such an alleged outright repudiation of the parties' agreement, the Complainants reason, would constitute a refusal to bargain in good faith.

In other words, the Complainants are not complaining about an issue of contract interpretation. Instead, the Complainants, pursuant to their statutory right to prosecute an unfair practice claim, assert that the School Corporation has taken a number of actions which, if considered together, may demonstrate that the School Corporation repudiated a provision of the parties' contract. If such School Corporation action, in fact, occurred, the School Corporation may have violated IC 20-7.5-1-7(a)(5) and (6) and, in so doing, may have committed an unfair practice.

The factual issues presented by the parties' pleadings are not confined to the language of the contract. Therein, the Complainants substantially charge that the School Corporation has relieved the superintendent of his duty to fulfill the School Corporation's obligation to engage in statutory discussion with the Complainants. The School Corporation categorically denies that assertion. Thus, the parties' pleadings have placed factual issues in question.

In view of the discussion above and that which occurred during the telephonic prehearing conference on March 21, 2001, the Hearing Examiner now OVERRULES the Respondent's Motion to Reconsider Respondent's Motion to Dismiss.

Dated this 22"d day of March, 2001.

Ivan Floyd
Hearing Examiner

SEAL

BEFORE THE INDIANA EDUCATION EMPLOYMENT RELATIONS BOARD

EASTERN GREENE TEACHERS ORGANIZATION, and CHRISLYN A. CLOUSE,	)	
Complainants,	)	
and	)	Case No. U-00-12-2940
EASTERN SCHOOL DISTRICT OF GREENE COUNTY,	)	
Respondent.	)	

HEARING EXAMINER'S RULING ON COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT

This case is before the Hearing Examiner upon the **Complainants' Motion for Summary Judgment**, attached Affidavits, and Exhibits A through K, which motion, affidavits, and exhibits are in the following words and figures:

[H.I.]

And upon the **Respondent's Response to Complainant's Motion for Summary Judgment** and attached Affidavit, filed May 23, 2001, which response and affidavit are in the following words and figures:

[H.I.]

The Hearing Examiner, having considered the **Complainants' Motion for Summary Judgment** and the **Respondent's Response to Complainants' Motion for Summary Judgment**, the affidavits, exhibits, **Complaint**, and **Answer**, now

FINDS that the **Motion for Summary Judgement** should be, and hereby is, **DENIED** and **OVERRULED** because genuine issues of material fact exist and that the undisputed facts may support conflicting inferences.

Following is a discussion of the Hearing Examiner's reasons for this ruling.

Discussion

There are several genuine issues of material fact still unresolved by the pleadings, affidavits, and exhibits. These issues are:

1. What are all of the circumstances and conditions surrounding the hiring of Dawn R. James and Sally Jo Huntington?

2. What are the duties of Dawn R. James and Sally Jo Huntington?

The parties agree that the School Board posted a vacancy notice for "POSITION: Teaching Assistant - Must hold an Indiana teaching license." The Complainants argue that the requirement that the teaching assistants hold an Indiana teaching license means they are "certificated" teachers under the law, Certificated Educational Employee Bargaining Act, and are covered by the existing collective bargaining agreement. The School Board contends that they are neither covered by the statute or by the collective bargaining recognition clause because "it hired Sally Jo Huntington and Dawn R. James as elementary teaching assistants, not teachers." The Respondent says neither was hired as nor performed the duties of a teacher as defined by the collective bargaining agreement.

In order to determine this case it is necessary to determine whether Dawn R. James and Sally Jo Huntington are "certificated" teachers as defined by IC 207.5-1-2(f) to be included or excluded under the coverage of the collective bargaining statute. It must also be determined whether they "perform instructional functions for which State Instructional licensing is required" and are covered by the recognition clause of the collective bargaining agreement.

The collective bargaining agreement does not track the statute. They are different. The definition of a "certificated" school employee under the statute is broader than the definition of covered employees under the recognition clause of the collective bargaining agreement.

The statute says:

> "'School employee' means any full-time certificated person in the employment of the school employer...."
>
> "'Certificated employee' means a person whose contract with the school corporation requires that he hold a license or permit as provided in IC 20-6.1." *See* IC 20-7.5-1-2 (e) and (f).

The collective bargaining recognition clause says:

> "'Teacher' means all full-time and part-time certificated personnel performing instructional functions for which State Instructional licensing is required, except ..."
>
> "The Board recognizes the Association as the exclusive representative of all teachers in the bargaining unit."

See Exhibit J attached to the Complainant's Motion For Summary Judgment.

The first determinative question of whether they are covered by the statute is essentially a unit determination question. This raises two general questions. First, what is the existing bargaining unit description; and, second, should Dawn R. James and Sally Jo Huntington's jobs be included within it.

A second determinative question is whether they are included within the recognition clause as agreed to by the parties in the collective bargaining agreement. This essentially depends upon whether the jobs they do are instructional even if they are certificated. Another question is whether the contract recognition clause should, or can, vary from the unit description in the initial recognition or I.E.E.R.B. certification.

To determine whether these positions should be an accretion to the bargaining unit, all of the usual unit determination issues need to be addressed in this case. The law provides four criteria for making a unit determination. These are:

1. efficient administration of school operation;
2. the existence of a community of interest among school employees;
3. the effects on the school corporation and school employees of fragmentation of units; and
4. recommendations of the parties.

See IC 20-7.5-1-10 (a) (2).

Certificated School Employees

There is a genuine issue of fact that calls for more evidence on the circumstances surrounding the hiring of James and Huntington. It would be helpful to have direct testimony and cross-examination about the interviews, job descriptions, job duties, supervision, evaluations, and other matters relating to what the duties of these job positions are. All of the kinds of evidence that are usually offered for unit determinations would be helpful in making this decision.

More evidence is needed concerning the issue of whether these are "certificated" teachers under the statute. This would include more about the Teachers Retirement Fund payments and the "mistaken" payment of them, the job duties, and more evidence about the Federal Class Size Reduction Act under which they were hired. Who administers this Act and the grants? Is it the U.S. Department of Education and/or the Indiana Department of Education? What did Congress contemplate when it passed this act, and do the Act, Congress, and the State DOE require licensed teachers in order to receive these grants, or is

there provision for non-licensed, non-instructional personnel to be funded with a grant? How is the cost allocated between federal, state, and local funds? More evidence explaining this Act would be helpful in determining whether these are "certificated" school employees.

Existing Unit Description

What is the unit description that was used when the School Board recognized the Eastern Greene Teachers Organization? Was EGTO voluntarily recognized? If so, what was the unit description used in the thirty-day posting and official school board action when EGTO was recognized? Was there an I.E.E.R.B. election and certification of the EGTO as exclusive representative? If so, what was the bargaining unit description used in that election and I.E.E.R.B. certification? Either way, does the bargaining unit description at initial recognition or I.E.E.R.B. certification match the unit recognition clause in the collective bargaining agreement? If not, why not?

Instructional Functions For Which State Licensing Is Required

The opposing affidavits and briefs of the parties frame the most critical of the genuine issues of material fact as being whether Sally Jo Huntington and Dawn R. James perform instructional functions for which State licensing is required. In this regard the following evidence is needed.

First, there should be evidence concerning when Ms. Huntington and Ms. James arrive at and leave school, and everything they do in between. Perhaps, work they do at home might also be relevant. In other words, what are their job duties?

Second, evidence concerning the Teacher Retirement Fund contributions as opposed to Public Employment Retirement Fund contributions would be helpful. How did this come about? Was it a mistake as the Superintendent says it was?

Third, how does the Federal Class Size Reduction Act relate to the job duties of Ms. Huntington and Ms. James? Do Congress, the U.S. DOE and Indiana DOE require that persons hired under these grants perform certain duties and are these instructional in nature?

Hearing examiners have the responsibility to prepare a report to the I.E.E.R.B. with a recommended order. Another responsibility that is equally important is to insure that there is a good record made about the issues in the case so that the I.E.E.R.B. and courts reviewing the decision may know what the facts are.

"... After the receipt of all post-hearing papers, the hearing examiner

shall prepare a report. The report shall contain findings of fact, conclusions of law, and a recommended order. The conclusion of law must be supported by a concise statement of the underlying basic facts of record and by a statement of the applicable law...."
See 560 IAC 2-3-21.

So far, there are certain facts that are not clear in this case so that a decision can be made about coverage by the statute and contract recognition clause. For this reason, the Motion for Summary Judgment is denied.

The hearing for this case will be held on July 10, 2001, at 10:00 a.m. at the Administration Offices of the Respondent.

ORDERED this 4th day of June, 2001, at Brownsburg, Indiana,

By: Donald G. Russell
Hearing Examiner

BEFORE THE INDIANA EDUCATION EMPLOYMENT RELATIONS BOARD

GOSHEN EDUCATION ASSOCIATION, et al.,	)	
Complainants,	)	
and	)	Case No. U-00-03-2315
BOARD OF SCHOOL TRUSTEES OF THE GOSHEN COMMUNITY SCHOOLS,	)	
Respondent.	)	

HEARING EXAMINER'S REPORT

Pursuant to the pleadings in the above-captioned case, upon the basis of the parties' Joint Stipulations, upon the basis of evidence adduced at a hearing held in the School Corporation's Administration Building in Goshen, Indiana, on February 20, 2001, and upon his evaluation of the credibility of the witnesses, consideration of pre- and post-hearing briefs submitted by the parties, and the applicable law, the Hearing Examiner now makes the following:

FINDINGS AND CONCLUSIONS OF FACT

1. The Complainant Goshen Education Association ("Association"), at all times material, was a "school employee organization" as that term is defined by Section 2(k) of the Indiana Code 20-7.5-1, Public Law 217-1973 ("Act").

2. The Respondent Board of School Trustees of the Goshen Community Schools ("School Corporation"), at all times material, was a "school employer" as that term is defined by Section 2(c) of the Act.

3. Complainant Thomas Holtzinger, who signed the "Complaint for Unfair Practice" herein under oath, was a "school employee" of the School Corporation as the term "school employee" is defined by Section 2(e) of the Act and, at all times material, was co-president of the Association.

4. The Association, at all times material, was the "exclusive representative" of the School Corporation's school employees as the term "exclusive representative" is defined by Section 2(l) of the Act.

5. Dr. Kenneth Blad was superintendent of the School Corporation from January, 1990 through December, 1997.

6. Dr. Kent Evans became superintendent in January, 1998. He continues to serve in that position. From at least January, 1990, until January, 1998, Dr. Evans served as deputy superintendent.

7. Dr. Bruce Stahly became the School Corporation's deputy superintendent in April, 1998, and continues to serve in that position. Stahly oversees the School Corporation's financial affairs, its buildings and grounds, its student transportation system, and its technology. In this case, Stahly assembled and explained School Corporation documents dating from 1991 through 2000.

8. The evidence in this case shows that no School Corporation official acted in bad faith. The evidence further shows that no School Corporation official intentionally engaged in any wrongful conduct.

   Of equal import, the Association's counsel, in his opening statement, similarly emphasized that the Association was not alleging herein that the School Corporation intentionally committed any wrongful act. The Association's counsel stated:

   > ... I do want to say publicly that we are not contending that there was any bad faith here on the part of any school administrator or any school board member. We don't contend that there was any intentional misconduct on the part of anyone.

9. Stahly first learned that there was a potential problem soon after he arrived in 1998. Claims that year were high, and the School Corporation had to make all of its premium payments to pay those claims. The School Corporation first advised the Association of the potential problem in May 1998.

10. From approximately 1986 through calendar year 1999, the School Corporation operated a self-insured health insurance program ("self-insured plan").

11. The School Corporation's monies to support the self-insured plan for the teachers came from the general fund (and from other funds out of which employee compensation and benefit costs were paid).

12. Payments to support the self-insured plan were made by the School Corporation to an account called the 110 account or the self-insurance fund ("self-insurance fund").

13. The self-insurance fund was not a separate bank account. Instead, it was an internal account within the chart of accounts of the School Corporation.

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14. Funds were paid from the self-insurance fund to the health insurance trust fund ("trust account"), which was a separate bank account held by Key Trust Company of Indiana, N.A.

15. Once funds were deposited in the self-insurance fund or in the trust account they were never returned to the general fund.[1]

16. The School Corporation employed Pyramid Benefits as a third-party administrator.

17. Pyramid reviewed claims to determine coverage and limits. Then Pyramid drew funds from the Key trust account to pay medical providers. All claims and expenses of the self-insured plan were paid from the trust account.

18. When the third-party administrator determined that additional funds were needed in the trust account, it contacted the School Corporation. Funds were then transferred by the School Corporation from the self-insurance fund to the trust account.

19. With the knowledge and anticipation of the Association, the School Corporation purchased stop-loss or excess loss insurance through Security Life of Denver to protect against catastrophic losses.

20. Two separate types of insurance were purchased.

21. One type, called specific stop-loss or excess loss insurance, paid claims on any individual participant over $100,000 in any one calendar year.

22. The second type, called aggregate stop-loss or excess loss insurance, paid all claims over an annual, pre-agreed upon, total amount of claims paid by the School Corporation.

23. In some calendar years, the aggregate stop-loss or excess loss insurance began paying all claims after the self-insured plan paid 115% of expected claims. In other years, the coverage began at 125% of expected claims. The particular percentage at which the stop-loss insurance began paying was referred to as the attachment point.

24. The difference between expected claims and the excess loss attachment point is referred to as the "gap."

25. The School Corporation's stop-loss insurance policy provided that the School Corporation would prepay all losses which were covered under the School Corporation's stop-loss insurance policy. Later, the reinsurance carrier would reimburse the School Corporation for those prepayments of claims in excess of the deductible amount in the stop-loss insurance coverage.

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[1] Occasionally, small amounts were returned to participants whose payments of premiums exceeded the amount owed.

26. The cost of the stop-loss insurance was paid from the trust account of the self-insured plan rather than from the general fund.

27. The Association believed that the purpose of the stop-loss insurance was to safeguard and protect the plan and its reserves. The Association believed that the reinsurance reimbursements were deposited in the trust account.

28. Under this self-insured plan, the School Corporation was the "insurer" or "carrier" and bore the risk of loss.

29. Each collective bargaining agreement negotiated between the parties from at least 1995 through 1999 contained a provision under which the School Corporation and individual teachers in the bargaining unit, who chose to participate in the self-insured plan, shared the cost of the self-insured plan.

30. The parties had collective bargaining agreements for the following years: 1995-97, 1997-99, and 1999-2001.

31. Section A of Article XVI of the 1995-97 and 1997-99 Collective Bargaining Agreements reads as follows:

Section A of Article XVI[2]

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[2] The remainder of Article XVI of the 1995-97 and 1997-99 Collective Bargaining Agreements also provided as follows:

A. HEALTH AND DENTAL

* * *

4. Teachers not desiring to enroll in either the single or family medical insurance plan shall be allowed to apply an amount equal to eighty percent (80%) of the Board's contribution for a single medical plan toward an optional benefit program as adopted by the GEA and the Board of Education. Once established, the amount of this optional benefit shall not increase during the school year.
5. Married couples both teaching in the Goshen Schools shall receive a fully paid Health and Dental Insurance Plan, less $1. In addition, one spouse shall be allowed to apply an amount equal to fifty percent (50%) of the Board's contribution for a single medical plan toward an optional benefit program as adopted by the GEA and the Board of Education. Once established, the amount of this optional benefit shall not increase during the school year.
6. The Board shall pay for teachers on less than a full time contract on the same % as the contract.
7. The Board will continue payment of its portion of health insurance premiums as required by the Family and Medical Leave Act of 1993.

* * *

E. EVALUATION OF INSURANCE

The Goshen Community Schools is committed to obtaining the optimum benefits for its insurance premiums, and to that end will:

1. Evaluate its insurance program on an annual basis.
2. All carriers and programs shall be adopted by mutual agreement of parties.
3. Establish a program of education in an attempt to help participants more efficiently use their insurance benefits.

A. HEALTH AND DENTAL

1. The present policy benefits including:

a. medical coverage maximum of one million dollars.

b. pregnancy treated as illness.

c. co-insurance.

d. Major medical deductible of $ 100.00 per person with a maximum of two (2) per family.

e. no deductibles for dental oral exams, x-rays, fluoride treatments or cleaning.

f. dental shall have a $1,000.00 maximum per year.

2. The Board shall pay up to $2000 for single coverage for the [1995-97 or 1997-99][3] school years. The teacher will pay the balance of the cost, if any, but at least $1.

3. The Board shall pay up to $4650 for family coverage for the [1995-97 or 1997-99] school years. The teacher will pay the balance of the cost, if any, but at least $1.

32. On the other hand, the language of Section A of Article XVI in the 1999-01 Collective Bargaining Agreement differed from that of the previous years. The provision reads as follows:

Section A of Article XVI

A. HEALTH AND DENTAL[4]

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[3] The term of the contract was the only language in Article XVI of the 1995-97 Collective Bargaining Agreement that differed from the language in Article XVI of the 1997-99 Collective Bargaining Agreement. The dollar amounts in the two collective bargaining agreements were the same.

[4] The remainder of Section A of Article XVI in the 1999-01 Collective Bargaining Agreement also differed and provided as follows:

A. HEALTH AND DENTAL

* * *

4. Teachers not desiring to enroll in either the single or family medical insurance plan shall be allowed to apply an amount equal to eighty percent (80%) of the Board's contribution for a single medical plan toward an optional benefit program as adopted by the GEA and the Board of Education. Once established, the amount of this optional benefit shall not increase during the school year. Teachers enrolled (or requesting to be enrolled) in this optional benefit program during the 1999-2000 school year shall continue receiving this optional benefit. For all other teachers this optional benefit will not continue to be offered after the 1999-2000 school year.

5. Married couples both teaching in the Goshen Schools shall receive a fully paid Health and Dental Insurance Plan, less $1. In addition, one spouse shall be allowed to apply an amount equal to fifty percent (50%) of the Board's contribution for a single medical plan toward an optional benefit program as adopted by the GEA and the Board of Education. Once established, the amount of this optional benefit shall not increase during the school year. Teachers enrolled (or requesting to be enrolled) in this optional benefit program during the 1999-2000 school year shall continue receiving this optional benefit. For all other married teachers this optional benefit will not continue to be offered after the 1999-2000 school year.

* * *

7. The Board will continue payment of its portion of health insurance premiums as required by the Family and Medical Leave Act of 1993 (currently three [3] months). The three month period will begin with the first leave date, paid or unpaid.

1. The present policy benefits including:
   a. medical coverage maximum of one million dollars.
   b. pregnancy treated as illness.
   c. co-insurance.
   d. Major medical deductible of $100.00 per person with a maximum of two (2) per family.
   e. no deductibles for dental oral exams, x-rays, fluoride treatments or cleaning.
   f. dental shall have a $1,000.00 maximum per year.

2. The Board shall pay up to $2,400 for single coverage for the 2000 calendar year (January 1, 2000 and continuing through December 31, 2000). Effective January 1, 2001 the Board will pay up to $2,400 plus 65% of any rate increase for the 2001 calendar year (January 1, 2001 and continuing through December 31, 2001). The teacher will pay the balance of the cost, if any, but at least $1.

3. The Board shall pay up to $5,600 for family coverage for the 2000 calendar year (January 1, 2000 and continuing through December 31, 2000). Effective January 1, 2001 the Board will pay up to $5,600 plus 65% of any rate increase for the 2001 calendar year (January 1, 2001 and continuing through December 31, 2001). The teacher will pay the balance of the cost, if any, but at least $1.

33. Prior to the 1999-01 contract, both parties understood this contract language to mean that the School Corporation would support the self-insured plan except to the extent that the amount of premiums established for the respective year exceeded the dollar amounts in the corresponding collective bargaining agreement. The teachers would pay the amount of premium established for the respective year which exceeded the dollar amounts in the corresponding collective bargaining agreement. In all instances, the teachers would pay at least $1.00.

    The language was never taken to mean that teachers would actually be required to pay their own medical or hospital bills at any point, other than through the standard deductibles, co-insurances, and exclusions. Premiums paid by the School Corporation and teachers were expected to pay anticipated claims; but obviously, there could be years in which actual claims exceeded anticipated claims, sometimes substantially.

34. When actual claims exceeded anticipated claims (and thus the total amount of premium to be contributed) in any given year, the School Corporation paid the difference between expected claims and the amount set as the attachment point[5] for the aggregate excess loss insurance. In other words, the School Corporation as self-insurer bore the risk of loss in the "gap" between anticipated claims and that attachment point.

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[5] For example, 115% .or 125% of the expected claims.

35. Section A of Article XVI of these three collective bargaining agreements makes reference to the School Corporation's "present policy." The School Corporation's "present policy" to which reference was made in the 1995-97 and 1997-99 collective bargaining agreements was composed of the Plan Document and Summary Plan Description for Goshen Community Schools, Amendments thereto, the Employee Benefits Fund Management Agreement, the Pyramid Benefit Services Claims Administration Agreement as renewed by Renewal Amendments thereto and the School Corporation's health and dental group excess loss insurance policy issued by Security Life of Denver Insurance Company, Group Policy Number G-46085.

36. The Plan Document and Summary Plan Description states with respect to funding:

> **Cost of the Plan**
> Goshen Community Schools shares the cost of Employee and Dependent coverage under this Plan with the covered Employee. The enrollment application for coverage will include a payroll deduction authorization. This authorization must be filled out, signed and returned with the enrollment application.
>
> The level of any Employee contributions is set by the Plan Administrator. The Plan Administrator reserves the right to change the level of Employee contributions.
>
> at page 5, and
>
> The cost of the Plan is funded as follows:
>
> **For Employee and Dependent Coverage:** Funding is derived from the funds of the Employer and contributions made by the covered Employees.
>
> The level of any Employee contributions will be set by the Plan Administrator. These Employee contributions will be used in funding the cost of the Plan as soon as practicable after they have been received from the Employee or withheld from the Employee's pay through payroll deduction.
>
> at page 52.

37. The provisions in Article XVI which are set forth in Findings and Conclusions of Fact Numbers 31and 32 (and the footnotes thereto) are the only provisions in the three collective bargaining agreements relating to teacher health insurance benefits. All three of those collective bargaining agreements contain an integration clause, Article XIX, which reads as follows:

> XIX. ENTIRE AGREEMENT
>
> Both parties agree that this contract sets forth the terms and conditions to

which each party agrees to be bound and includes the entire agreement between the parties, replacing and canceling all previous oral and written agreements.

There were no amendments to the 1995-97 Collective Bargaining Agreement. There were no amendments to the 1997-99 Collective Bargaining Agreement other than a memorandum of understanding regarding early retirement. There have been no amendments to the 1999-2001 Collective Bargaining Agreement.

38. Article IV of both the 1995-97 and the 1997-99 collective bargaining agreements, entitled "MANAGEMENT RIGHTS," incorporates all the rights as enumerated in the General School Powers Act of 1965, as amended. Additionally, that contract article incorporates all of the responsibilities and authority set forth in Section 6(b) of the Act.

39. Article XVII in the 1995-97, 1997-99, and 1999-2001 collective bargaining agreements sets forth a grievance procedure which culminates with advisory arbitration.

40. On or before January 1, 1985, the School Corporation and the Association established an Insurance Committee for the purpose of reviewing and making recommendations regarding group insurance coverages.

41. The Insurance Committee meetings were conducted in a pro forma manner. The superintendent, the deputy superintendent, and the insurance broker, Stan Burt, represented the School Corporation. The Association was represented by Tom Holtzinger and Don Bokhart and perhaps another member or two. Holtzinger and Bokhart were also members of the Association's bargaining team at all relevant times.

42. In the fall of each school year, the Insurance Committee met to determine whether to continue the self-insured plan in the upcoming calendar year. At each of these annual meetings, the deputy superintendent reported on the status of the self-insured plan.

43. Then, Burt would explain what the amount (or cost) of the premium would be for the following year. That premium constituted the estimated total cost of the teacher health insurance coverage under the self-insured plan for the following calendar year. The amount of the premium was always composed of the three following cost components:
    (1) the estimated cost of the anticipated claims,
    (2) the cost of both specific and aggregate stop-loss insurance, and
    (3) certain other fees and expenses, such as the cost of the third-party administrator, bank fees, and insurance brokerage fees.

44. After Burt explained the respective costs for the upcoming year, the Association members would decide whether they wanted to keep the same coverage for another year, with the amount (or cost) of the premium being Burt's new calculation. In all relevant years, except 2000 and 2001, the Association chose to continue the self-insured health plan.

45. After the Association decided to keep the self-insured plan, the parties then in negotiations

bargained specific dollar amounts that the School Corporation would pay for single plans and for family plans. When the negotiations concluded, any teacher could determine the cost of his or her health insurance by simply subtracting the above-described specific amount, which the School Corporation would pay, from the premium. For example, if the premium for a single plan was $1950 and if the School Corporation agreed to pay $2000 for a single plan, a single teacher would pay only the obligatory one dollar. Similarly, if the premium for a family plan was $5000 and if the School Corporation agreed to pay $4000 for a family plan, a teacher with a family plan would pay $1000.

46. Although the teachers on the Insurance Committee met annually to learn the estimated cost of the self-insured plan, the teachers and the Association played no other part in the design, operation, or administration of the self-insured plan.

47. The Association was not advised monthly or semi-annually as to plan balances, claim levels, or other such details.

48. From the evidence, it can be inferred that the teachers *thought* that both the teachers and the School Corporation were *obligated to pay their respective shares of the premium* into the self-insured plan in each calendar year.[6]

They knew that biweekly deductions were made from the teachers' paychecks to pay the teachers' share of the premium. They would have known that the relevant portion of the health insurance policy provided that the amounts withheld from the teachers' paychecks were to be

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[6] The following exchange occurred between Association-witness Don Bokhart and the Association's counsel:

Q If that insurance company was called upon to make a payment under the stop-loss protection, where did you think the money from that insurance company would go?

A I thought it went into the trust account.

Q Did you have an understanding as to how the school district was paying its part of the cost of the health plan?

A No. I just assumed that the money went into the, that the deposits were made into the trust account.

Q Had anybody, until this dispute arose, ever told you anything to the contrary?

A No

Q Until this dispute arose, did you ever learn that the school district had done anything with the reinsurance money or the excess money, other than put it in the trust account?

A No.

Q And then you say that you believe the intention was to build a reserve; is that correct?

A Correct.

deposited immediately into the plan. Thus, they reasoned that, since the teachers were making periodic payments, the School Corporation was also doing so. They did not know whether the School Corporation was making biweekly or monthly payments.

49. In 1997, the School Corporation paid in accord with the parties' prevailing Collective Bargaining Agreement all of the costs for full-time teachers' health insurance coverage except for the obligatory $1.00. In 1998, the School Corporation paid all but $1.00 of the costs for full-time teachers' single health insurance coverage and all but about $48.84 of the costs for family health insurance coverage.

50. In 1999, the School Corporation paid all but $381.64 of the costs for single health insurance coverage and all but about $1466.40 of the costs for family health insurance coverage.

51. Before April of 1999, the contributions made by the teachers and the contributions made by the School Corporation from the general and other funds were transferred into the School Corporation's self-insurance fund. The practice changed in April of 1999; in that month and thereafter in 1999, the School Corporation's contributions of premiums were deposited directly into the School Corporation's trust account.

52. Before April of 1999, the School Corporation would pay for anticipated costs of the self-insured plan by transferring premium from the self-insurance fund to the trust account.

53. The School Corporation would pay for unanticipated costs of the self-insured plan by transferring from the self-insurance fund to the trust account such monies as might be required from time to time to pay claims which in the aggregate exceeded the aggregate amount of claims anticipated when the levels of premium were set, but which did not in the aggregate exceed the aggregate deductible of the excess loss insurance.

54. The School Corporation would also have to "pay" a second category of unanticipated claims. In any year in which the aggregate claims exceed the deductible of the excess loss insurance, the School Corporation would have to pre-pay such a catastrophic loss. Later, the reinsurance carrier would reimburse the School Corporation. In any such instance, the School Corporation would have to actually pay the costs associated with the gap. Such costs are described in the preceding finding.

55. In May, 1997, the School Corporation received a reinsurance reimbursement in the amount of $424,583.29. The School Corporation deposited that reimbursement in the self-insurance fund.

56. In 1997, the School Corporation failed to make its monthly premium payments in July, August, and November.

57. The School Corporation used reinsurance reimbursements to make those three 1997 monthly premium payments.

58. The failure to make those three premium payments in 1997 did not occur because of low claims in that particular year. Actual claims for 1997 exceeded the funds placed in the trust account by approximately $500,000.

59. At the time the School Corporation utilized reinsurance reimbursement proceeds to make the School Corporation's routine monthly premium payments in July, August, and November, 1997, the Association was unaware that the School Corporation had deviated from the previous practice of making monthly premium payments only from the general fund into the self-insurance fund.[7] The Association did not become fully aware of that deviation until told by Indiana State Teachers Association consultants and by the School Corporation's insurance consultant, Dennis Maggart, in 1999.

60. In 1997, the School Corporation failed to make its November and December monthly transfers of premiums from the self-insurance fund to the trust account.

61. Claims in 1998 significantly exceeded the projected claims. There were inadequate funds in the trust account to pay the claims. Because of the high claims, the School Corporation paid more than the expected premium in 1998. The School Corporation made those excess payments not because the School Corporation had missed payments in 1997 but rather because of the high claims in 1998.

62. Premium payments from the general fund to the self-insurance fund or to the trust account were generally made monthly. Transfers of premiums from the self-insurance fund to the trust account also were generally made monthly.

63. However, the School Corporation failed to make several monthly premium payments in years other than 1997. Specifically, the School Corporation failed to make the following additional monthly premium payments:

    (1) two monthly premium payments in 1991;
    (2) one monthly premium payment in 1992; and
    (3) two monthly premium payments in 1994.

The Association was unaware until recently that the School Corporation failed to make those monthly premium payments. No evidence was introduced to show the effect of the non-payment of those five monthly premium payments.

64. The School Corporation did not use reinsurance reimbursements to finance those five monthly premium payments.

65. Similarly, the School Corporation failed to make some of its monthly transfers of monies from the self-insurance fund to the trust account. Specifically, the School Corporation did not make the following transfers: (1) a November transfer in 1991; (2) a December transfer in 1992; (3) November

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[7] Prior to April, 1999, the School Corporation occasionally made such premium payments directly from the general fund into the trust account. In April, 1999, and subsequent thereto, the School Corporation made all premium payments from the general fund directly into the trust account.

and December transfers in 1994, and (4) November and December transfers in 1997. Otherwise, the School Corporation made monthly transfers from the self-insurance fund to the trust account in each calendar year from 1991 to and including 1997. The School Corporation's failure to make those above-described transfer payments will have no effect on the outcome of this case.

66. At the September 21, 1999, negotiations meeting, the Association made an attempt to introduce the issue regarding the usage of the May, 1997, reinsurance reimbursement proceeds. Specifically, the Association wished to discuss the fact that the School Corporation made premium payments from those reinsurance reimbursement proceeds in July, August, and November, 1997, rather than making such payments from the general fund. Holtzinger made the Association's presentation in which he asked the School Corporation to develop a plan which would, over five or ten years, address the School Corporation's failure to make those three 1997 monthly premium payments from the general fund.

Dr. Duell, an assistant superintendent, abruptly admonished Holtzinger that only the Association's spokesperson -- UniServ Director Kent Kimpel -- was authorized to articulate Association proposals. There was no follow-up to Holtzinger's presentation. The School Corporation's failure to make those three 1997 monthly premium payments from the general fund was never brought up again in the 1999-2001 negotiations. Similarly, the appropriate usage of reinsurance reimbursements was also never discussed again.

67. On June 10, 1999, Kimpel informed the Association that he believed the parties would have to deal with this dispute through "bargaining" and "advocacy_" In view of the September 21, 1999, negotiations meeting, Kimpel advised the Association on September 27, 1999, that this dispute could best be resolved by filing an unfair practice claim. The Association's executive committee voted 12-0, with one abstention, later that day to file this Complaint for Unfair Practice.

68. The totals of all contributions required from all sources for each of the years 1996, 1997, 1998 and 1999 -- the total annual premium required in each of those plan years -- were:

1996	2,026,988.57
1997	2,240,402.68
1998	2,341,047.07
1999	2,990,532.49

The actual costs of the health and dental benefits plan -- as measured by disbursements from the trust account (cash basis accounting), not by claims and other liabilities incurred each year (accrual basis accounting) -- were:

1996	2,227,999.67
1997	2,360,573.98
1998	3,166,243.02

1999 3,120,305.48[8]

The resultant cost overruns were:

1996 201,011.10
1997 120,171.30
1998 825,195.95
1999 129,772.99

69. The School Corporation received reimbursements under its group excess loss insurance policy as follows:

DURING CALENDAR YEAR	AMOUNT FOR EXCESS AGGREGATE COSTS	AMOUNT FOR EXCESS SPECIFIC LOSSES
1997	439,828.20	101,234.54
1998	2,000.00	276,435.71
1999	0.00	127,035.24

Except for a reimbursement of $4,602.48 in 1997 for excess specific losses, all of these reimbursements were deposited into the School Corporation's self-insurance fund.

70. In 1997, the total of all funds committed to support of the School Corporation's self-insured plan was $2,763,248.59, calculated as follows:

Health insurance trust account, beginning balance	636,677.93
Self-insurance fund, beginning balance	12,594.51
Deposits into the self-insurance fund	2,090,029.35
Interest paid on the health insurance trust account	26,651.75
Refunds of overpayment of premium by participants	(2,704.95)
	2,763,248.59

71. In 1998, the total of all funds committed to support the School Corporation's self-insured plan was $3,185,529.77, calculated as follows:

[8] This figure includes $14,000 paid out of the self-insurance fund to Dennis Maggart, insurance consultant.

Health insurance trust account, beginning balance	154,264.68
Self-insurance fund, beginning balance	245,883.49
Deposits into the self-insurance fund	1,822,781.68
Deposits into the health insurance trust account from sources other than the self-insurance fund	955,847.50
Interest paid on the health insurance trust account	7,328.71
Refunds of overpayment of premium by participants	(576.38)
	3,185,529.77

72. In 1999, the total of all funds committed to support the School Corporation's self-insured plan was $3,347,914.87, calculated as follows:

Health insurance trust account, beginning balance	14,483.82
Self-insurance fund, beginning balance	12,338.02
Deposits into the self-insurance fund	1,717,856.95
Deposits into the health insurance trust account from sources other than the self-insurance fund	1,597,265.53
Interest paid on the health insurance trust account	6,581.18
Refunds of overpayment of premium by participants	(610.63)
	3,347,914.87

73. Stahly tried to reconstruct the School Corporation's documents for the years 1991 through 1999. In particular, Stahly attempted to compute the difference between the amount of the premiums the School Corporation paid into the self-insurance fund in 1997 and the amount of the premiums the School Corporation should have paid into the self-insurance fund in 1997 if the School Corporation had made all twelve of its monthly premium payments. Stahly's calculations show that the School Corporation's premium payments in 1997 were at least $386,000 less than they should have been if the School Corporation had made all twelve of its 1997 monthly premium payments.

74. This matter did not become a subject of dispute until the claims experience of 1998 necessitated an increase in premium for 1999.

75. On December 3, 1998, the School Corporation notified the teachers by memorandum that the self-insured plan premium would have a 30% increase in 1999. That memorandum described two alternative, less expensive plans with correspondingly less coverage.

76. After evaluating their options, the teachers decided to continue the self-insured plan in 1999 and to pay the 30% premium increase.

77. On January 18, 1999, the Association requested information from the School Corporation regarding the self-insured plan. The requested information was provided. The School Corporation and Association then engaged in discussions.

78. In these discussions, the School Corporation took the position that "the reinsurance reimbursements were in fact reimbursements of amounts spent by the School Corporation to pay benefits under the School Corporation's self-insured plan and could be *utilized* by the School Corporation for *any purpose*."[9] (emphasis added)

79. The Association took the position in these discussions that these reimbursements should have been deposited directly into the trust account where they would have built up a reserve which, in view of the Association, would have had a significant impact on the premium amounts required in 1999.

80. During the negotiations in the fall of 1999 regarding health insurance, the parties talked/bargained about the School Corporation paying $2000 on the single plan in 2000 and $2000 (plus 65% of any increase in the single plan in 2001). In regard to the family plan, the parties talked/bargained about $5500 in 2000 and $5500 (plus 65% of any increase in the family plan in 2001).

Two thousand dollars on the single plan represented an increase of zero dollars from the previous year. Five thousand five hundred dollars represented a $850 increase on the family plan from the previous year.

Although the parties' dispute over reinsurance reimbursements was briefly mentioned only once during the actual negotiations, the School Corporation argues that the negotiations, at least in part, were undertaken in an effort to settle this dispute. The School Corporation concedes that it

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[9] Note that once the self-insured plan becomes completely insolvent, as this plan did in 1999, any prepayment of a catastrophic loss must be paid with funds which originate from the general fund. In such an instance, the reinsurance reimbursement could be utilized by the School Corporation for any purpose. However, that is not what happened here.

In this case, in 1996, the School Corporation used the premium payments that were in the self-insured plan to prepay the catastrophic loss. Then, when the reinsurance reimbursement was made the School Corporation wanted to treat the reimbursement not as a return of funds from the self-insured plan but rather as funds which originated from the general fund (and could be used for any purpose). *See* Discussion, *infra*, on pages 22 through 26.

never mentioned such an effort to settle the dispute to the Association.

The one time the Association brought the reinsurance reimbursements up during negotiations, the School Corporation rebuffed the Association. Settlement of this dispute never came up again in negotiations.

81. In December, 1999, during the latter part of the negotiations on the 1999-2001 Collective Bargaining Agreement, the School Corporation offered to pay more of the teachers' health insurance premium than the teachers had requested. Specifically, the School Corporation offered to pay an additional $400 on the single plans and an additional $100 on the family plans. The School Corporation had already offered to pay an additional $850 on the family plans.

82. Several facts belie the School Corporation's assertion that the parties settled the dispute herein during the 1999-01 negotiations on the collective bargaining agreement. First, the Association was/is seeking a remedy of approximately $450,000. The School Corporation's gratuitous additional contribution to the teachers' health insurance premium was only $400 per single plan and $100 per family plan. Second, the Association attempted to address the reinsurance receivables dispute on September 21, 1999, at the bargaining table, and were harshly rebuffed by a School Corporation administrator. After rebuffing the Association, the School Corporation declined to initiate express negotiations on the issue of the 1997 reinsurance receivables.

83. Additionally, both parties had legitimate collective bargaining reasons for agreeing to the additional School Corporation contribution to the teachers' health insurance premium. The School Corporation did not pay as large a percentage of the non-certificated employees' health insurance premium as it did of the teachers' health insurance premium. Thus, the School Corporation wished to give the non-certificated employees an additional $400 on the single plan. The School Corporation simply decided to give the teachers the same additional dollars on health insurance.

Furthermore, the School Corporation was hoping the additional dollars for health insurance would effect two other distinct outcomes. First, the School Corporation was hoping (as contrasted to forthrightly asking the Association) that the additional School Corporation contribution to the teachers would mollify the Association and that the Association would not file an unfair practice complaint. Second, the School Corporation believed its offer of additional dollars on insurance would *assure Association settlement and ratification* of the entire 1999-2001 collective bargaining agreement (as contrasted to settlement of the Association's unfair practice claim).

84. Finally, when the School Corporation made its offer to contribute additional dollars toward the health insurance premium, the Association was still trying to obtain a little higher salary raise. The Association perceived the School Corporation's gratuitous offer as an attempt to provide the teachers additional dollars simply to settle the collective bargaining agreement. The Association did not consider the School Corporation's gratuitous offer to be a bona fide offer to compromise and resolve the parties' dispute over the School Corporation's usage of reinsurance receivables in 1997.

85. The evidence does not support the School Corporation's assertion that the parties' dispute over the usage of reinsurance reimbursements in 1997 was on the bargaining table in November and December, 1999, when the intensive bargaining on financial issues occurred.

86. At no time did the School Corporation ever expressly ask the Association to resolve the dispute over the 1997 reinsurance receivables as a part of the parties' settlement of the 1999-2001 collective bargaining agreement.

87. Beginning January 1, 2000, the self-insured plan was closed. The School Corporation now purchases health insurance from the ISTA Insurance Trust.

88. At the end of the last plan year of a self-insured plan, there were claims outstanding which were incurred during the period of self-insurance but which had not yet been recorded or, if recorded, not yet paid.

89. This is referred to as the IBNR or incurred but not reported claims. It is also known as the "run-out."

90. When the School Corporation closed its self-insured plan at the end of 1999, there was an estimated $634,897 in IBNR, or run-out, claims which had to be paid. The actual amount of IBNR at the end of 2000 was $423,249.31. The School Corporation's health insurance trust account paid dental IBNR, and then the balance in the trust account, $157,880.95, was transferred from the trust account to the ISTA Insurance Trust to be applied against medical IBNR, thereby reducing the total of medical IBNR to be financed from the estimated $634,897 to $265,368.36.

91. As part of a multi-year insurance program, the ISTA Insurance Trust financed payment of this run-out by imposing a surcharge in addition to the premium.

ISSUE

Did the School Corporation, by making a unilateral change in how the reinsurance reimbursements were used in 1997, violate the Act and thereby commit a refusal to bargain unfair practice?

DISCUSSION

I.

Here, the Association alleges that the School Corporation engaged in an unfair practice by unilaterally changing a subject of mandatory bargaining. Specifically, the Association alleges that the School Corporation changed its past practice by using reinsurance reimbursements to make the School Corporation's monthly premium payments. Reinsurance is a component of a self-insured health plan, which is - a fringe benefit. Therefore, the Association concludes that the School

Corporation made a unilateral change in a mandatory subject of bargaining, and, in doing so, committed an unfair practice under Section 4 of the Act.

The School Corporation denies the Association's allegation by maintaining that the evidence shows the School Corporation fulfilled its contractual duty by committing funds each relevant year to the self-insured plan which were in excess of the respective calculated costs of the plan. The School Corporation further maintains that it had no contractual obligation to make monthly premium payments. Finally, the School Corporation reasons that several affirmative defenses apply in this case.

Now the applicable law must be reviewed. Section 4 of the Act enumerates items that the parties must bargain. Specifically, Section 4 states:

> **A school employer shall bargain collectively with the exclusive representative on the following: salary, wages, hours, and salary and wage related fringe benefits.**

Health insurance is an obvious salary and wage related fringe benefit within our Nation's socioeconomic scheme. However, IEERB has also held other less obvious items to be salary and wage related fringe benefits. For example, in MSD of Washington Township, U-87-10-5370, 1987 IEERB Ann. Rep. 89, 93 (1987), Board *aff'd in pertinent part*, 1988 IEERB Ann. Rep. 72, 75 (1988), the Board held that a school corporation-sponsored "wellness program" was a salary and wage related fringe benefit that must be bargained with the teachers. Additionally, in Kankakee Valley School Corporation, U-83-5-3785, 1983 IEERB Ann. Rep. 135,142 (1983), Board *aff'd in pertinent part*, 1984 IEERB Ann. Rep. 93, 100 (1984), the Board held maternity leave and sick leave to be salary and wage related fringe benefits.

Similarly, the concept of unilateral change has been a part of the IEERB case law for many years. Examination of an IEERB case with a rather simple factual situation will illustrate the concept of unilateral change. In MSD of Warren Township, U-92-51-5360, 1995 IEERB Ann. Rep. 242 (1995), Board *aff'd in pertinent part*, 1995 IEERB Ann. Rep. 246 (1995), the school corporation changed its long-term disability insurance carrier[10] and simultaneously reduced the teachers' disability benefits. The hearing examiner held that the reduction in benefits was a unilateral change in a mandatory subject of bargaining and that such a change constituted a refusal to bargain unfair practice. 1995 IEERB Ann. Rep.at 244. The Board affirmed the hearing examiner's holding on the issue of reduced benefits. 1995 IEERB Ann. Rep. at 247. *See also*, South Dearborn School Corporation, U-90-20-1600, 1991 IEERB Ann. Rep. 240, 243 (1991); Fayette County School Corporation, U-82-15-2395, 1982 IEERB Ann. Rep. 398,403 (1982).

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[10] The hearing examiner also held that the teachers' organization had no statutory right to bargain the carrier in the absence of a unilateral change in the benefits. The Board did not adopt that holding. Instead, the Board found that the hearing examiner's holding in regard to the change in the teachers' benefits addressed and resolved the only issue presented by the facts. Therefore, the Board declined to decide whether a change in the carrier without a corresponding change in the benefits was an unfair practice because any such holding would have been dicta.

B.

Although the Warren Township case clearly demonstrates how a unilateral change occurs within a factual situation, two additional aspects of some unilateral changes must be explored before that legal concept can be appropriately applied herein. First, although the school corporation intentionally committed the unilateral change in the teachers' disability benefits in the Warren Township case, it is not necessary for the alleged wrongdoer to have intended to commit a unilateral change unfair practice. In Board of School Trustees of the Mississinewa Community Schools, U-744-2855, 1974-75 IEERB Ann. Rep. 456 (1975), the school corporation unwittingly made unilateral changes in several handbook items which previously had been agreed upon by the parties. The hearing examiner held that such unilateral school corporation action "conclusively manifests a lack of good faith by that employer in bargaining." The hearing examiner further observed that the duty to bargain may be violated in a situation wherein the alleged wrongdoer acted "subjectively in good faith," stating:

> **We hold that an employer's unilateral change in conditions of employment under negotiations is similarly a violation of Section 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objective of Section 8(a)(5) as much as does a flat refusal.**

Id. at 461. Thus, in the present case, it is of no import that the School Corporation did not intend to misappropriate reinsurance reimbursement proceeds. Under Mississinewa, the School Corporation could still have violated the Act even though it had no intention of doing so.

Second, in many instances involving a unilateral change by a school corporation, the change involves a breach of some contractual agreement between the parties. For example, in Warren Township, the school corporation had a contractual duty to continue providing the same disability benefits to the teachers. There, the school corporation's unilateral change also constituted a breach of contract.

In the present case, however, the School Corporation had no contractual duty to refrain from making the alleged unilateral change -- that is, using the reinsurance reimbursement proceeds to make routine monthly premium payments from which ordinary claims were paid. Instead, in this instance, the School Corporation made a unilateral change in a previous course of conduct (or in a past practice). In all prior years the School Corporation had used the reinsurance reimbursement proceeds to pay catastrophic losses: that is, losses which were in excess of the deductible of the stop-loss insurance. Based on the prior conduct of the School Corporation, the teachers had a reasonable expectation that the School Corporation would continue in 1997 to pay such losses from the reinsurance reimbursement proceeds rather than using the reinsurance proceeds to make routine monthly premium payments from which ordinary claims were paid. Thus, herein the duty on the

School Corporation to continue using reinsurance reimbursements as it had in the past arose not from a contract but from the past practice of the parties.

The IEERB case law concerning past practice is somewhat limited. The legal concept was articulated in Union County School Corporation, 1981 IEERB Ann. Rep. 3 92 (1981), *rev'd on other grounds* at 471 N.E.2d 1191 (Ind. Ct. App. 1984).[11] In Union County, in 1976-77 the school corporation was closed for 18 days due to inclement weather. The school corporation paid the teachers for those missed days. Since the school corporation later required the teachers to make up three of those days, it issued supplemental contracts to pay the teachers extra for those three days.

In 1977-78, the school was closed for 19 days due to inclement weather. That year the school corporation required the teachers to make up seven days for which they did not receive extra compensation. The IEERB held that based on the theory of past practice that the school corporation could not change its position on extra pay in 1977-78 without bargaining the issue with the teachers. In explaining the significance of the theory of past practice, the hearing examiner stated:

> **Past practices are important in that they represent the agreed upon solution to a problem arranged between the employer and the employees. A past practice need not, to be binding upon the parties, be reduced to writing. An employer or exclusive representative ignores past practices at their peril, putting at risk the relationship, or trust, of the parties. Unfortunately, in this instance, the employer simply made unilateral changes without bargaining the wages, or make-up schedule, with the exclusive representative.**

Union County, 1981 IEERB Ann. Rep. at 397, Board *aff'd*, 1982 IEERB Ann. Rep. 518 (1982), *rev'd on other grounds* at 471 N.E.2d 1191, 1196-1197.

The Indiana Court of Appeals first recognized and applied the legal concept of past practice under the Act in Union County School Corporation v. Indiana Education Employment Relations Board, 471 N.E.2d 1191, 1198-1199 (Ind. Ct. App. 1984). Therein, the school corporation was closed for a number of days in both 1976-77 and 1977-78 due to inclement weather. In 1976-77, the school corporation gave the teachers extra pay for three make-up days. In 1977-78, the school corporation refused to give the teachers extra pay for the seven make-up days. The school corporation did not bargain or "discuss" the make-up days with the exclusive teachers' organization in 1977-78. The exclusive teachers' organization and the IEERB took the position that the school corporation had violated the past practice in regard to bargaining and "discussing" the make-up days and the school calendar.

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[11] *See also* Mount Pleasant Township Community School Corporation, U-98-02-1910, 2000 IEERB Ann. Rep. 34,66-67 (2000), Board *aff'd*, 2000 IEERB Ann. Rep. 85 (2000).

The Court in Union County rejected the past practice argument in regard to the issue of bargaining extra pay and the school calendar. The Court found that those two items were managerial prerogatives which the school corporation could not delegate to the bargaining process. Conversely, the Court held that the concept of past practice was applicable to the potential "discussion" violation by the school corporation. The Court based its analysis of the "discussion" issue on the concept of past practice and the inferences which may be drawn in an instance wherein one party disengages from the parties' past practice and thereby injures the other party, who continued the past practice based on the reasonable belief that both parties would continue it. Here, the Court observed that since the school corporation paid the teachers extra for the make-up days in 1976-77, it was reasonable for the teachers to assume that they would be paid extra for make-up days in 1977-78. As a result of having justifiably relied on that 1976-77 past practice regarding extra pay, the teachers had no reason to seek "discussion" about that same subject in 1977-78. The Court conversely observed that the school corporation was aware that it did not intend to pay the teachers in 1977-78 for makeup days.

Confronted with those facts, the Court concluded that since the teachers had no knowledge of any impending change regarding extra pay for make-up days, timely "discussion" of such a change in the school corporation's extra-pay policy could have occurred only if the school corporation had initiated it. Therefore, the Union County Court held that the school corporation therein had failed (or "refused") to fulfill its statutory obligation to "discuss" those 1977-78 make-up days.

The Union County case illustrates how flexibly the concept of past practice may be applied to prevent an injustice from occurring in an instance wherein one party inappropriately discontinues a past practice to the detriment of the other party who in good faith believed the past practice would continue. As a result of that flexibility, the concept of past practice may be applied in many other factual situations to prevent similar injustices. For example, in the present case, the concept of past practice can be invoked to resolve the parties' dispute over the proper usage of reinsurance reimbursement proceeds.

C.

In the years prior to 1997, the School Corporation used reinsurance reimbursements to pay catastrophic losses (as contrasted to ordinary, anticipated claims). However, in 1997, the School Corporation used reinsurance reimbursements to make three of the School Corporation's monthly premium payments.

In an effort to better understand the dispute between the parties, consider the following hypothetical situation which demonstrates how the self-insured plan should have operated *in 1997.* For example, assume that the health plan in 1996 incurred catastrophic losses that exceeded the deductible of the aggregate stop-loss insurance. Further assume that those catastrophic losses equaled approximately $425,000. In 1996 the trust account would have "pre-paid" the catastrophic loss claimants (providers) an amount equal to $425,000. Then, in 1997, the reinsurance carrier would have reimbursed the self-insured plan (that is, the School Corporation) in an amount equal to that of

the pre-payment from the self-insured plan: $425,000. The School Corporation would have deposited those reinsurance reimbursements in the self-insurance fund. Simultaneously the School Corporation in 1997 would have continued making average monthly premium payments of approximately $150,000. Three such premium payments would add an additional $450,000 to the self-insurance fund which could be used to pay claims in 1998 or 1999. The $425,000 reinsurance reimbursements would remain in the self-insurance fund or the trust account to pre-pay future catastrophic losses.

However, that is not what happened here. In this case, the School Corporation in 1997 deposited the reinsurance reimbursements of approximately $425,000 into the self-insurance fund. But in 1997 the School Corporation decided not to make three of the routine monthly premium payments from its general fund to the self-insurance fund. Instead, the School Corporation used the reinsurance reimbursements ($425,000) to make approximately three monthly premium payments.[12] Those reinsurance reimbursements were then used to pay ordinary, anticipated claims rather than future catastrophic losses. The result was two-fold. First, the three premium payments -- $450,000 - - were not available in 1998 or 1999 to pay claims. Second, the School Corporation's general fund contained an additional $450,000 that the School Corporation argues can be used for any purpose.

As noted above, it is an unfair practice to make a unilateral change in a mandatory subject of bargaining. Here, in 1996 and the years prior thereto, the School Corporation occasionally did not make all of its routine monthly premium payments from its general fund to the self-insurance fund.[13] However, in those years the School Corporation did not use reinsurance reimbursements to make monthly premium payments which it failed to make from its general fund.

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[12] Joint Stipulation 65 reads as follows:

> Because these excess loss insurance reimbursements provided monies out of which the School Corporation's contributions of premium could be made, for certain periods of time it was not necessary for the School Corporation to make regular monthly contributions to the self-insurance fund out of the general fund (for members of the bargaining unit and others), the transportation fund, the Elkhart County Special Education Cooperative fund, or any other fund which pays employee compensation and benefit costs.

Joint Stipulation 75 reads as follows:

> In these discussions, the school employer took the position that the excess loss insurance reimbursements were in fact reimbursements of amounts spent by the School Corporation to pay benefits under the School Corporation's self-insurance plan and could be utilized by the School Corporation for any purpose. (emphasis added)

See also the discussion concerning the fundamental mechanics of the self-insured plan in 1997 on pages 24 through 26.

[13] Note that a few of those premium payments may have been made directly to the trust account.

In 1997, the School Corporation made a unilateral change in the use of a component of the teachers' self-insured health plan: that is, the School Corporation changed how it used reinsurance reimbursements. The reinsurance reimbursements connected with that health plan are a bargainable fringe benefit. Thus, the School Corporation unilaterally changed a mandatory subject of bargaining.

In other words, in 1997, the School Corporation made a unilateral change in its past practice in regard to how it used reinsurance reimbursements. In 1996 and prior thereto, the School Corporation used reinsurance reimbursements only to supplement premium payments to the self-insurance fund (as contrasted to supplanting premium payments). In 1997, for the first time the School Corporation used reinsurance reimbursements to make three routine monthly premium payments, which it had failed to make from its general fund. In doing so, the School Corporation made a unilateral change in a past practice involving a mandatory subject of bargaining. Such School Corporation conduct constituted a refusal to bargain unfair practice.

II.

A.

Finally, a common sense analysis of the most fundamental mechanics of the self-insured plan *in 1997* must be made to determine if the outcome of our purely legal analysis is flawed. The *original source* and the *basic nature* of the monies in the self-insurance fund and in the trust account never change. Note, however, that the form of some of the assets in the self-insurance fund and trust account does change when a catastrophe loss occurs. In all instances, when a transfer is made to a catastrophic-loss claimant by the third-party administrator, the form of some of the specific assets changes from a cash deposit to an account receivable of equal value.

The original source of all monies in the self-insurance fund and the trust account was premium contributions made by the School Corporation and by the teachers.[14] When the School Corporation transferred premium payments to the self-insurance fund those monies were no longer discretionary School Corporation funds. Instead, they were part of the teachers' compensation package; and, after their transfer to the self-insurance fund, they were monies being held for the benefit of the teachers' health plan (and not for the benefit of the School Corporation's general fund).

When a catastrophic loss occurs the third-party administrator is required to make a transfer from the trust account to the claimant in regard to the catastrophic loss. When that transfer occurs, the form of some of the earlier premium payments changes (from a cash deposit to an account

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[14] For the sake of simplicity, interest earned on those premium payments is not addressed in this discussion. Note that all interest earned on those premium payments would inure to the benefit of the teachers' health plan because such interest was earned on monies that were being held for the benefit of the teachers' health plan. For the same reason assume that the gap was paid for with reserves that had carried over from the previous years.

receivable); but the transfer does not reduce the total amount of assets being held for the benefit of the teachers' health plan. In particular, such a transfer concerning a catastrophic loss does not convert assets being held for the benefit of the teachers' health plan into discretionary School Corporation monies.[15]

When a catastrophic loss occurs and funds are transferred ("prepaid") from the self-insurance trust account to claimants, such a transfer is not a true expenditure. If it were a true expenditure the assets being held for the benefit of the teachers' health plan (in the self-insurance fund and in the trust account) would be depleted in an amount equal to the transfer of cash to the claimant (provider). However, when such a transfer is made, the total amount of assets being held (in the self-insurance fund and the trust account) for the benefit of teachers' health plan does not change.

As was illustrated above, only the form of those assets changes. Some of those assets being held for the benefit of the teachers' health plan change from a cash deposit into an account receivable in the self-insurance fund of equal value. In other words, no such depletion of assets occurs. Simultaneously, the reinsurance carrier incurs an account payable in an amount equal to the account receivable in the self-insurance fund.

When such an account receivable is collected, the original source of the asset remains the same. The original source was a School Corporation premium payment in a prior year. Therefore, if those reinsurance reimbursements are used to make another premium payment from which ordinary claims will be paid, the School Corporation, in effect, is attempting to make two premium payments (one the past year and one in the present year) with the same money: that is, money whose original source was a premium payment in the prior year.

The underlying fact that the School Corporation is attempting to make two premium payments with only one-month's worth of money is a simple concept. The reason the true nature of the transaction (that is, a "prepayment" with a corresponding reinsurance reimbursement) eludes us from time to time is three-fold. First, the fact that money is fungible causes us to lose sight of the original source and nature of monies in the self-insurance fund and in the trust account. Second, the fact that we perhaps inappropriately refer the transfer of monies to a catastrophic-loss claimant as a prepayment gives the false impression that the School Corporation actually expended discretionary School Corporation funds.

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[15] This analysis assumes that the self-insured plan was solvent and that prepayments of catastrophic losses were made solely from the self-insured plan itself rather than from funds transferred from the general fund to an insolvent self-insured plan for the specific purpose of prepaying a catastrophic loss.

No such School Corporation expenditure occurred. The monies transferred in a pre-payment to a catastrophic-loss claimant were not a part of the School Corporation's general fund. Instead, those monies were a part of the teachers' health plan.

Third, the fact that the reinsurance reimbursements come back through the bank account of the School Corporation creates the illusion that those monies (whose original source was a premium payment in a prior year) somehow belong to the School Corporation instead of belonging to the teachers' health plan. In fact, those monies are accounts receivable that arose when cash in the teachers' health plan was transferred to a catastrophic-loss claimant.[16]

[16] Note that the School Corporation, through its own conduct, appears to acknowledge this fact. In the relevant years -- 1997, 1998, and 1999 -- the School Corporation deposited all reinsurance reimbursements into the self-insurance fund.

As demonstrated above, a common sense review of the fundamental operation of the self-insured plan in 1997[17] did not expose any fallacy in the outcome of our legal analysis. Therefore, it must ultimately be determined herein that the School Corporation made a unilateral change in a mandatory subject of bargaining and that, in doing so, the School Corporation committed a refusal to bargain unfair practice.

B.

In sum, after reviewing several options, the parties decided in December, 1999 to terminate the self-insured plan and obtain a fully insured health insurance plan. The new plan was through the ISTA Insurance Trust which was to finance a portion of the IBNR which was estimated to be $634,897.00. Such financing was achieved by placing a surcharge on the premiums to pay claims.

Thus, in January, 2000, the teachers began paying higher premiums because there were insufficient funds in the trust account to pay outstanding claims. If the additional $450,000 had been in the trust account, most of the anticipated IBNR could have been paid without placing a surcharge

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[17] On the other hand, note that if the self-insured plan is insolvent, as it was in 1998, then the School Corporation is correct in saying that reinsurance reimbursements may be utilized for any purpose. The reason is that under those circumstances the monies for the prepayment of the catastrophic loss must originally come from the general fund rather than from the self-insured plan itself. Since those funds were a part of the general fund rather than the self-insured plan, they retain the same character when they are returned to the School Corporation as a reinsurance reimbursement. Thus, the School Corporation may use such reimbursements for any purpose.

In other words, whether the School Corporation may use reinsurance reimbursements for any purpose will always depend upon the source of the monies which were used to prepay the catastrophic loss in question. If the monies were a part of the self-insured plan itself, then the reinsurance reimbursements must be used to repay the self-insured plan. Conversely, if the monies originated from the general fund (because no funds remained in the self-insured plan), then the reinsurance reimbursements may be used for any school purpose.

on the teachers' premiums under the fully insured plan.

REMEDY

The standard remedy for a School Corporation's unfair practice should be applied in this case. Such a remedy should consist of an order requiring the School Corporation to cease and desist its unfair practice, rescinding the unilateral action, and restoring the status quo ante as nearly as possible. MSD of Warren Township, U-92-51-5360,1995 IEERB Ann. Rep. 242,243 (1995), Board aff'd in pertinent part, 1995 IEERB Ann. Rep. 246, 247 (1995); see also Special Services Unit Federation of Teachers v. Board of Directors of the Madison Area Educational Special Services Unit, 656 N.E.2d 832 (Ind. Ct. App. 1995) (wherein the appropriate remedy was a return to a situation which approximated the status quo ante).

CONCLUSIONS OF LAW

1. The Indiana Education Employment Relations Board has jurisdiction over the parties and the subject matter of the controversy herein.

2. The Respondent violated Sections 4 and 7(a)(5) and (6) of the Act in 1997 by unilaterally changing the past practice as to the use of reinsurance reimbursements. Reinsurance is a component part of a self-insured health plan and is a fringe benefit which is a mandatory subject of bargaining. Therefore, the Respondent committed a refusal to bargain unfair practice.

RECOMMENDED ORDER

1. The Respondent is ordered to cease and desist, now and in the future, from refusing to bargain with the Association by taking unilateral action in regard to the use of the reinsurance reimbursements.

2. The Respondent is ordered to rescind its action of using the reinsurance reimbursements in 1997 to make three of the School Corporation's routine monthly premium payments.

3. To reasonably restore the status quo ante, the School Corporation is ordered to pay an amount of money equal to the amount of the three missed monthly premium payments plus interest. The evidence shows that the three missed payments were equal to approximately $450,000. The money should be paid to the ISTA Insurance Trust in a manner which will benefit exclusively the teachers as they make their contributions to the ISTA Insurance Trust.

Pursuant to the Rules of the Indiana Education Employment Relations Board, and specifically Rule 560 IAC 2-3-21(a), this case is transferred to the Indiana Education Employment Relations Board.

To preserve an objection to the Hearing Examiner's Report, a party must object to the Report in a writing that identifies the basis of the objection with reasonable particularity. Such writing must be filed with the Indiana Education Employment Relations Board within fifteen (15) days after the Report is served on the petitioning party. See I.C. 4-21.5-3-29(c) and (d), 560 IAC 2-3-22 and 23.

Dated this 20th day of August, 2001.

Ivan Floyd
Hearing Examiner

1999 UNFAIR PRACTICE COMPLAINTS

	SCHOOL CORPORATION	CASE NUMBER	COUNTY	DISPOSITION
1.	Hobart	U-99-16-4730	Lake	Dismissed
2.	Marion	U-99-01-2865	Grant	Pending
3.	Marion	U-99-02-2865	Grant	Pending
4.	North Montgomery	U-99-08-5835	Montgomery	Decision

BEFORE THE INDIANA EDUCATION EMPLOYMENT RELATIONS BOARD

NORTH MONTGOMERY TEACHERS ASSOCIATION and MARY HODGE,	)	
Complainants,	)	
and	)	Case Number: U-99-08-5835
NORTH MONTGOMERY COMMUNITY SCHOOL CORPORATION, *et al.*,	)	
Respondents.	)	

HEARING EXAMINER'S REPORT

I.

Pursuant to the pleadings in the above-captioned case, upon the basis of the evidence adduced at the hearing in the North Montgomery High School library near Linden, Indiana, on January 11 and 12, February 2 and 3, February 29, and April 10, 2000, and upon her evaluation of the credibility of the witnesses, consideration of the post-hearing papers submitted by the parties, and the applicable law, the Hearing Examiner now makes the following:

Findings and Conclusions of Fact

1 . The Complainant, Mary "Missy" Hodge, who signed the complaint for unfair practice herein under oath, at all times material, was a "school employee" of the North Montgomery Community School Corporation as defined by §2(e) of IC 20-7.5-1, Public Law 217-1973 ["Act"] and a "permanent teacher" as defined by IC 20-6.1-4-9, Public Law 100-1976 ["Tenure Act"] at Northridge Middle School.

2. The Respondent, North Montgomery Community School Corporation ["Corporation"], at all times material, was a "school employer" as that term is defined in §2(c) of the Act.

3. The North Montgomery Teachers Association ["Association"], at all times material, was a "school employee organization" as that term is defined by §2(k) of the Act and was the "exclusive representative" of the school employees of the Corporation as that term is defined by §2(1) of the Act.

4. At the time the complaint and amended complaint were filed, John Walker was a "school employee" of the Corporation as defined by §2(e) of the Act and the president of the Association. At the time of the hearing, Glenda Frees was a "school employee" of the Corporation as defined by §2(e) of the Act and successor president of the Association.

5. At all times material, Linda Hurt was a "school employee" of the Corporation as defined by §2(e) of the Act and the Association's building representative for Northridge Middle School.

6. At all times material, Dennis Renshaw was the Corporation's "superintendent" as that term is defined in §2(d) of the Act.

7. At the time the complaint was filed, Michael Sowers was the principal of Northridge Middle School and a "supervisor" as that term is defined in §2(h) of the Act.

8. At the time of the hearing, Karla Cronk was the principal of Northridge Middle School and a "supervisor" as that term is defined in §2(h) of the Act.

9. At all times material, Cheryl Grant was the assistant principal of Northridge Middle School and a "supervisor" as that term is defined in §2(h) of the Act.

10. At all times material, Richard M. Cornstuble was the Indiana State Teachers Association ["ISTA"] UniServ Director and one of Hodge's representatives.

11. Hodge commenced her teaching career in the Corporation at Cold Creek in January 1978. She was subsequently transferred to Darlington until Northridge Middle School was opened. At all times, Hodge taught math and, for a short period of time, physical education.

12. For almost twenty (20) years, Hodge was considered an acceptable, if not effective, teacher. However, several consistent shortcomings in her teaching were manifested from observations conducted by various supervisors throughout those years. Some of those shortcomings were a messy room, loose discipline, sitting at her desk rather than walking around the room helping students, preferential treatment toward some of the students, eating and drinking in the classroom, talking about students in front of the class, not sufficiently explaining the subject matter to the students, misgraded assignments, and sending students to run personal errands for her during class time. Nearly every supervisor observed that Hodge needed to move around the classroom more. A common theme throughout Hodge's tenure was the judgment that she did not react well to criticism.

13. Hodge's messy room through the years created several custodian complaints. One such complaint was formally lodged in January 1998 because the custodians had to get down on their hands and knees to pick up the debris before they could vacuum.

14. Renshaw, who had been the Corporation's superintendent for four (4) years at the time of the hearing, claimed that he learned of Hodge his first year as the superintendent with complaints

about her classroom management, instruction, housekeeping, and grading inconsistency. In fact, on or about February 11, 1998, the superintendent met with a small group of parents concerning Hodge's performance. One parent who could not attend that meeting reduced her concerns to writing and forwarded it to the superintendent. Other parents complained to the superintendent or to the principal about Hodge's performance during the 1997-98 school year.

15. On May 13, 1998, Wes Hammond, Hodge's principal and supervisor at that time, sent a memo to Hodge outlining areas of concerns previously discussed but continuing to surface. He listed those concerns and laid out an improvement plan for Hodge to follow.

16. Hodge was among a few teachers identified prior to the 1998-99 school year as deficient. Building principals were to meet with those teachers and design a professional improvement plan. The superintendent knew that Hodge's principal would be meeting with her at the beginning of the 1998-99 school year as the concerns were serious enough to result in termination or conditional status.

17. Beginning with the 1998-99 school year, the Corporation adopted the Saxon mathematics curriculum for the middle grades.[1] According to the Saxon philosophy:

> We believe that students learn by doing. Students learn mathematics best not by watching or listening to someone else, but by doing the problems themselves. **The focus of class time should be to provide the maximum opportunity for students to work productively on the prescribed problems.** (emphasis original)
>
> We also believe that mathematics is not difficult, just different. In our program, mathematics is taught (and learned) just as a foreign language or musical instrument is taught: incrementally through continued practice. Thus the two most important aspects of the program are the incremental development of concepts and continual practice. Incremental development refers to the division of concepts into small, easily understood pieces that are taught over several lessons. A major concept is not taught in one lesson, but rather is developed over time. We do not expect a student to understand a concept completely the first time it is taught. Continual practice means that fundamental skills and concepts are practiced and reviewed throughout the year. Continual practice provides the time and experiences necessary for concepts to become a part of the student's long-term learning.

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[1] The Association was not involved as an organization in the selection of the textbooks. The first time the president had knowledge concerning the Saxon method occurred when he became involved with Hodge.

> **Most lessons can be taught in fifteen minutes or less.** (emphasis added) Teachers should resist the temptation to lecture too long. Class time is used more effectively when students are working problems. Many of the skills in mathematics take a long time to develop, and students must be given the opportunity to develop and master these skills with the practice provided in the problem sets. Each problem set contains only a few problems illustrating the increment presented in that lesson. The remaining problems, which become increasingly more difficult as the year progresses, provide practice of the concepts previously presented. The goal should be to complete one lesson or test per day.

18. For several years Hodge, along with another middle school teacher, would spearhead a trip with students to Washington D.C. during spring break. On September 4, 1998, the teachers again submitted a request for the trip. On September 11, 1998, Sowers denied the trip request based on an outstanding debt to the touring company from the last trip. On September 19, 1998, the teachers replied to Sowers' trip denial memorandum. In a three and a half page, single-spaced, typewritten memorandum, the two teachers explained the difficulties of fund-raising efforts and collecting for last year's Washington D.C. trip. Sowers believed the reply memorandum from the two teachers to be very unprofessional and inappropriate and so noted on Hodge's evaluation later that year.

19. Sowers observed Hodge's classroom on September 23, October 5, and October 13, 1998.

20. On September 24,1998, a student was observed fetching water or tea for Hodge. On the same date, Sowers received a complaint from a parent about Hodge's messy and unorganized room. The parent's son could not function because the classroom was so loud and because so much "horsing around" took place.[2]

21. On October 15, 1998, Sowers received a complaint from a parent about Hodge being neglectful in supervising her class. While the child was sitting in his chair, other students were forcing him out of that chair into another. If the child did not move, the students would pick up his chair with him in it and move him to another location.

22. A few years earlier, Hodge was diagnosed as diabetic. Recurring related health problems were respiratory infections, pneumonia, obesity, high blood pressure, and sleep apnea. During 1998 and 1999, she was on a dietary regimen of eating at least four times a day and taking insulin twice daily.

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[2] At no time did Sowers or the assistant principal solicit parent complaints. Whenever a parent verbally complained about Hodge, both suggested reducing the complaint to writing.

23. On October 20, 1998, Hodge submitted a personal absence request for grastroplasty surgery to occur on or about November 23, 1998, and to continue for approximately four (4) weeks.[3] Hodge had apprised Sowers of the surgery at the beginning of the school year and explained that she was just waiting to hear from the insurance company before scheduling the surgery date. On October 21, 1998, Sowers sent Hodge the following memorandum:

> **As per your request for leave of absence, I want you to submit by Monday a.m., October 26, 1998 [,] a detailed written request to me and Mr. Renshaw, as to why you are requesting time off from school for "elective" surgery. You may place this in my mailbox at your convenience.**

24. On October 20, 1998, Sowers asked that Hodge meet with him on October 21, 1998, to discuss his observation and evaluation of her. They met briefly on that date. When Sowers mentioned instituting "due process" and advised Hodge that she might want a representative, Hodge followed the advice; and the official meeting was postponed to October 27, 1998.

25. The Association held an executive board meeting on October 20, 1998. At that meeting, Hodge raised concerns about buses, the Washington D.C. trip, taking tickets at ball games, and being refused an athletic pass because she did not take tickets at ball games. Hodge had also been denied access to some of the equipment in the office because it was paid for out of athletic funds, and Hodge allegedly did nothing to earn the usage of the equipment. A short time later, Sowers called Hodge into his office and rebuked her for making public comments and criticizing and attacking him personally in public.[4]

26. On October 22, 1998, Hodge submitted a letter to Superintendent Renshaw requesting leave under the Family Medical Leave Act ["FMLA"]. Her physician also wrote a note explaining for when the surgery was scheduled and for how long Hodge would be off work. Sowers acknowledged the request on October 26, 1998, stating that he was "not authorized to approve or deny an absence for 'elective' surgery for this length of time." He would let her know if any further documentation would be needed.

27. On October 27, 1998, Sowers, Grant, Cornstuble, and Hodge met concerning Hodge's

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[3] The insurance company did not consider the surgery "elective" or "cosmetic" and approved the procedure.

[4] The alleged "attack" was not public since the comments were uttered during a closed union meeting.

evaluation. Some of the concerns were with classroom management such as clutter, teaching competency such as instructing from her desk rather than moving around the classroom, classroom discipline, and professionalism such as excessive days out during the school year. Sowers advocated an improvement plan and set November 2, 1998, as a target date for pulling together the plan. In the meantime, Sowers required detailed lesson plans on a Friday for the following week's lessons. Hodge was directed to "clean and organize her room" and to "remove all excess desks and chairs ... not used on a daily basis." Sowers ordered the cleaning and organization to be complete on or before November 6, 1998. Hodge was informed that the evaluation process in the parties' collective bargaining agreement would be implemented to determine her status as a teacher in the Corporation.

28. Sowers met again with Hodge and Cornstuble on November 2, 1998. Hodge had a proposed performance improvement plan which included taking care of some of the clutter in her classroom, not using students to fetch tea or water, not reading students' grades in front of the class, and placing weekly lesson plans in Sowers' mailbox each Friday. The plan also included teaching less from her desk and utilizing a variety of teaching tools to enhance student learning. Hodge additionally agreed to take advantage of other teachers' offers to form a peer-evaluation and assistance committee. Sowers and Hodge agreed to meet on November 18, 1998, to assess the progress on the program and to make necessary changes. Hodge would have a representative present at that meeting.

29. According to Sowers, he never knew whether the Association or the ISTA would be representing Hodge, and he denied knowing who was the Association's building representative during 1998 or 1999. However, Hurt claimed that she, along with another teacher, informed him the first day of the 1998-99 school year that they would be the co-Association representatives.

30. Both Sowers and the assistant principal observed Hodge in separate classes on November 16, 1998.

31. Sowers and the assistant principal met with Hodge and Cornstuble on November 18, 1998, for a performance evaluation meeting. Part of the discussion centered on what Hodge should accomplish prior to leaving for surgery and while she was home recuperating. A part of Hodge's responsibility was to develop an improvement plan for the second semester.

32. On November 27, 1998, a parent complained that Hodge did not teach long enough and did not explain sufficiently how the answer was arrived at; consequently, the student was receiving poor grades. After the substitute teacher showed everyone on the chalkboard how to arrive at the answer, the student understood and was now receiving good grades. Another parent had similar complaints on December 18, 1998, and expressed a concern about Hodge returning to the classroom.

33. On January 11, 1999, prior to Hodge's return to work, a parent expressed a concern about the discipline in the classroom after Hodge returned.[5] The complaint was also about Hodge's

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[5] Hodge did not return to work until after January 14, 1999, because school was closed from January 4 through January 14, 1999.

ability to teach.

34. Sowers entertained three parent complaints on January 16, 1999. All were concerned about Hodge returning to work, and all questioned her ability to teach.

35. On January 18, 1999, Sowers noted that Hodge had no lesson plans for the week of January 18 through January 22, 1999. Additionally, she had not prepared an improvement plan for the second semester as had been agreed to at the November 18, 1998, meeting.

36. On January 22, 1999, Sowers sent a memo setting a meeting for Monday, January 25, 1999, with Hodge because he did not understand her lesson plans.

37. On January 23, 1999, a parent complained of Hodge's poor teaching ability; and the parent remarked that if she had another child go through Hodge's class, she would hire a tutor.

38. On January 25, 1999, the Board of School Trustees ["School Board"] removed "interim" from Sowers' title of principal.

39. On January 26, 1999, another parent complained about Hodge's teaching ability.

40. Sowers observed Hodge's classroom again on January 28, 1999.

41. On January 29, 1999, Sowers sent a memo to Hodge requesting a meeting after a faculty gathering on that day. He merely stated that the meeting regarded "some items we need to discuss." According to Sowers' note appended to a memorandum about needed improvements:

> **Miss Hodge failed to make this meeting or to notify me that she was not going to attend the meeting. Miss Hodge was present at the school until approximately 4:00 p.m. which was plenty of time to conduct the meeting. Miss Hodge acknowledged the meeting at 7:50 a.m. requesting it be moved to an early time during the school day so that she may visit her friend. I told her there was no time during the day to meet and it needed to be after school. Miss Hodge [sic] comment was 'I'll call Rick [Cornstuble]' and walked away. Nothing else was said the rest of the day. I assumed we were meeting at 3:20 p.m. after the faculty gathering as I requested. I made arrangements with [the assistant principal] to be at the meeting[.] We waited to find that no one was going to show.[6]**
>
> **[The] greatest disappointment is the lack of professionalism and courtesy to notify me that she was not going to make the meeting. This lack of professionalism and**

[6] Sowers generally preferred meeting with Hodge before or after school rather than her preparation period.

courtesy was noted on a previous evaluation as to an area that improvement was needed.

42. According to Hodge's handwritten notes, she received Sowers' memo on January 29, 1999, and asked him prior to 8:00 a.m. if the meeting could be rescheduled because she needed to leave town right after school. Sowers said he could not meet during her preparation period or before school. Hodge then called the Association president, who told Hodge that because of lack of notice and convenience, that she did not have to meet. Hodge also called Cornstuble. She then left a note in Sowers' box on Friday asking for a Monday meeting and explaining that Cornstuble needed more notice. Sowers later wrote to Hodge that he did not need for Cornstuble to be present at the January 29, 1999, meeting because the meeting was merely informational. E-mails were exchanged regarding rescheduling but were lost among other e-mails.

43. Items to be addressed at the meeting that did not occur on January 29 were outlined on a memo separate from the one requesting a meeting. Those items included parent complaints, the January 28 classroom observation, Hodge's cell phone that was left unattended in her classroom on January 27 when they were not to be in the view of students or used in school, the messy classroom condition, candy in the classroom, more improved lesson plans, and Hodge's improvement plan which was due upon her return to work.

44. On or about February 1, 1999, the assistant principal noted that Hodge had been scheduled to take tickets at the ball game but found a substitute without informing the assistant principal, even though Hodge had opportunities to do so.

45. On February 2, 1999, Sowers received another complaint in writing. The parents were having to teach basic math concepts to their child and questioned Hodge's teaching ability. By memo the same day, Sowers informed Hodge of the complaint.

46. On February 3, 1999, Hodge sent a note to Sowers that Cornstuble could not meet on that date but could meet on February 4. Sowers replied the same date that he could not meet on February 4. He further stated:

> **I am very frustrated about having this meeting as this is the second time I have tried to schedule it. It is fine if you wish to have Mr. [Cornstuble] there but his schedule seems to be a problem. I told you that this meeting was an informational meeting and it was not necessary for him to be there. I intend for the meeting to have the same agenda as was previously planned. I am rescheduling it for Friday, [February] 5, 1999, at 3:30 p.m.**

47. On February 4, 1999, Cornstuble, by letter, wrote:

> **Missy has informed me that you have requested a meeting and it is her assumption that it relates to her performance and to her continued employment with the North Montgomery Schools. She has asked that I be present at any meetings where her performance is to be discussed. This is, of course, her right.**

The letter further lists dates and times on which Cornstuble could be available. Sowers acknowledged receiving this letter by fax in a note dated February 5, 1999. In that note Sowers questioned what was wrong with the three prior dates and why he "did not receive cancellation notice until the day of and in many cases only two or three hours notice." He concluded this note with, "Again I am disappointed in the professionalism of Miss Hodge for her lack of communication to me as to the status of these meetings."

48. On Friday, February 5, 1999, by memo to Hodge, Sowers mentioned the meeting times of January 29, February 3, and February 5 that he had attempted to schedule but was unsuccessful; therefore, he would have to create a paper trail when requesting changes. He then spoke of the rejected lesson plans for their lack of format, information, and detail. He claimed Hodge's lesson plans were "merely an outline of direction." He delineated what each daily lesson plan should include. Those were:

    1. "Purpose, essential skills and proficiencies being met";
    2. "Agenda and time line";
    3. "Student objectives, Cognitive and Affective skills";
    4. "Procedures for what you are going to do and need";
    5. "Presentation outline"; and
    6. "Outcomes for the students."

He concluded with:

> **It is evident that improvement is needed in your lesson plans. I want you to rewrite your lesson plans and resubmit them to me by Tuesday, February 9,1999[,] 8:00 a.m.**

49. Hodge e-mailed Sowers on Monday, February 8, 1999:

> **I had understood from a previous meeting with you that my plans were okay. I had received positive feedback earlier from others on the staff when I asked for advice back in November. Therefore[,] I am not quite sure of the format you are expecting. Could you please refer me to someone in the building that could help me or their lesson plans that I could use as a guide?[7] Thanks**

50. By e-mail on February 8, Sowers replied:

> **If you would like to meet to [discuss] this[,] I would be happy to do this. We had set Monday[s] aside to work on your [improvement] plan. This was one of the reasons I had requested a meeting with you on the three prior dates. If you wish to do this[,] let me know.**

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[7] According to the Association president, Sowers was upset with other teachers helping Hodge with her lesson plans and cleaning her room. On the other hand, Hurt ... with Sowers' permission . . . pulled together a team of teachers to help Hodge.

51. A letter from a parent complaining about Hodge's poor teaching performance was addressed to Sowers on February 9, 1999.

52. On February 9, 1999, Sowers e-mailed Hodge setting a meeting for Wednesday, February 17, 1999.

53. On February 10, 1999, Sowers received a parent complaint written on February 9. The parent expressed frustration over her son's failing grades. He had received C's in sixth grade math. As with her two older children, if Hodge liked you, you got good grades; if not, you got bad grades.

54. One of the middle school teachers reported to the assistant principal on February 10, 1999, that she believed Sowers was attempting to make everything so uncomfortable for Hodge that she would just quit. Sowers' demands were unreasonable, impossible, and constantly changing.

55. Sowers and the assistant principal met with Hodge and Cornstuble on February 17, 1999. Sowers explained that the meeting was informational. The first item discussed was the numerous parent complaints. The second item was proximity teaching with Hodge needing to move around the classroom rather than sitting at her desk. Third, Hodge was advised not to keep her cell phone out so students could see it. Fourth, Hodge was criticized for her messy room and pointed to the garbage Sowers had gathered from her room since her return to work. After Hodge's several excuses, Sowers reminded her that the garbage piled in his office was picked up off her classroom floor after she had left for the day. Fifth, Sowers directed Hodge to get rid of all the candy in her room. When Hodge argued that she used the candy as a reward, Sowers told her to find another reward. Sixth, Hodge's lesson plans were improved. Seventh, Sowers raised the issue of the improvement plan which Hodge was to work on while she was recovering from her surgery, but he had seen nothing. Hodge seemed not to understand, but they arrived at some elements that could be included in the improvement plan that would help improve her teaching. Finally, heated discussion occurred over Hodge's surgery which Sowers continued to insist was "elective" since he had no proof otherwise and her leaving the state during the time she was to be recovering.

56. At the conclusion of the meeting, Hodge and Cornstuble left to talk in Hodge's classroom. About an hour later, Sowers and the assistant principal went to Hodge's classroom to determine its condition. A lot of trash, such as candy wrappers and spit wads, was on the floor; and a bag of candy canes was sitting on the floor. Sowers picked up the trash.

57. On February 22, 1999, Hodge submitted to Sowers a handwritten improvement plan.

58. On February 26, 1999, parents complained about Hodge in writing to the assistant principal about their son's failing grade for the grading period. They had no knowledge until the fourth week of the grading period that their son was failing. They also complained that Hodge remarked on their son's bad grade in front of the class, that students failed tests but did not know what they had missed, and that Hodge spent very little time teaching.

59. Other parents complained about Hodge in writing on February 26, 1999. They questioned how an A-B student could "drop to an F in a matter of five weeks with no indication from the teacher that he was struggling." They complained about the short instructional time, not seeing what their son missed on tests, and lost homework their son claimed he turned in.

60. On March 8, 1999, Sowers e-mailed Hodge regarding a missing lesson plan and attempting to schedule a meeting for the coming Wednesday or Friday after school with respect to parent letters recently received.

61. On March 9, 1999, Sowers stopped by Hodge's classroom to see if she had started cleaning her closets as per her improvement plan deadline of June 3, 1999. He noted that she still had not removed all of the candy from her classroom when she had been ordered to do so on February 17, 1999.

62. On March 11, 1999, Hodge requested a family illness day for Monday, March 15, 1999, to visit her fiancé in intensive care at Methodist Hospital in Indianapolis.[8] According to the parties' master contract:

> **A teacher shall be entitled to be absent for reasons of family illness for a total of four (4) days during a school year. Family shall be defined as immediate family (mother, father, spouse, son, daughter) or any household member of the teacher. These days shall not be charged against personal illness days. An immediate family member who is ill is the only use for these days. They are not taken from personal illness days, nor do they accumulate. These are not 'personal' leave days. A family illness day may be transferred to a personal leave day if needed.**

63. Sowers, along with the assistant principal, met with Hodge and Hurt, Hodge's teacher representative on Friday, March 12, 1999, concerning two parent complaints. Shortly after that meeting, Sowers followed Hodge into the workroom located in the office area. She became visibly upset when he asked her to change the family illness day to a personal leave day because his interpretation of the master contract was that a "any household member of the teacher" meant "dependent" member.[9] No one else was present during that conversation. Hodge never asked for a representative.

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[8] Hodge's fiancé lived in her house.

[9] Nothing in the record indicates that Hodge filed a grievance regarding the interpretation of "household member of the teacher."

64. A second letter, drafted on March 16, 1999, and received by Sowers on March 22, 1999, from parents, who had earlier complained, addressed how their son could have raised his grade from an F(48%) to a C+ in just two weeks. They wondered how many students were "lost because of her teaching skills and the fact that their parents aren't questioning those skills."

65. On March 17, 1999, Hodge filed a conduct report on a disrespectful student who talked out in class, yelled at his friends, cursed when warned about that over a period of several days, and asked Hodge personal questions in front of the class such as: Were you adopted? Is James Dean gay? When Hodge did not have a Kleenex, the student announced that he was going to "do a farmer's blow." Hodge did not refer the student to the principal or guidance but called the parent and left a message that she had written a discipline referral on her son. The parent later spoke with Sowers who read the referral to her. She expressed frustration with her son and his behavior and frustration with Hodge's poor teaching.[10]

66. Near the end of the day, the assistant principal called the student, who had received a discipline referral, to her office for a "chat." He complained about Hodge calling kids dumb and stupid, not explaining how an answer was arrived at, and provoking kids into losing their temper.

67. At some point during March 17, a parent called Sowers to complain about Hodge not explaining the material to the students and not providing her daughter with enough information. She was especially displeased that she had had no prior warning about the poor grade for this six weeks.

68. On March 18, 1999, a student spoke with the assistant principal about an incident that had occurred in Hodge's room that resulted in his receiving a discipline referral. The student's parent complained in writing because Hodge never attempted to assist her son in retrieving his things from the other kids and because the other kids who started the incident were not punished.

69. That same evening another parent complained about Hodge to the assistant principal. Her son had lost his self-esteem and had become very negative about math, school, and teachers.

70. As the superintendent requested, on or about March 19, 1999, Sowers began compiling a list of documents from his working file pertaining to Hodge. This document was later updated on March 30, April 1, and April 14, 1999.

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[10] This parent encouraged other parents to write letters complaining about Hodge. At no time did Sowers initiate or solicit complaints from parents or conduct a group meeting with parents.

71. On or about March 19, 1999, Sowers commenced compiling a chronological listing of documents contained in Hodge's personnel file[11] as requested by the superintendent.

72. Another parent complained in writing that she had a message on the telephone from Hodge announcing that her son "was being loud and leaving class without permission." According to the son, another student took his pencil and agenda; and when he tried to retrieve them, Hodge told him to sit down and shut up. After he told her twice about the incident and she did nothing, he walked out of class. The parent felt that Hodge should have scolded the student who took her son's pencil and agenda.

73. Another parent complained on March 22, 1999, that her daughter reported that she was not learning in Hodge's class. No teaching occurred, assignments were given, and the answers provided. The parent also questioned Hodge's grading practices.

74. A parent complained on March 24, 1999, that her daughter was distraught because she was failing math when she received A's and B's last year, and math had always been her favorite subject. The parent complained about Hodge not teaching concepts very effectively; and when students asked questions, she would become angry. Her daughter stopped asking questions because she did not want to get yelled at. Her daughter also observed that Hodge gagged a lot and spat in the wastebasket. She questioned why Hodge did not stay home if she was sick.

75. Article X, Reduction in Force, Section D, Recall Procedure, Subsection 11 of the master contract provides:

> **The teacher shall be notified of layoff in person by the Superintendent no later than April 1 of the school year the teacher is being terminated. The notice is to be followed by a certified letter within ten (10) calendar days of the personal notification by the Superintendent.**

76. In complying with Article X, Section D(11) of the parties' master agreement, the superintendent had his secretary contact Hodge on March 26, 1999, to schedule a meeting prior to April 1. Shortly after the telephone contact with Hodge, Cornstuble called the superintendent to inform him that he would be representing Hodge and that a letter waiving the contractual time lines pertaining to the cancellation of her contract would be forthcoming.

77. On March 26, 1999, Cornstuble faxed the following letter to the superintendent:

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[11] The "personnel file" referenced to in Sowers' March 19, 1999, memorandum was in fact the working file housed in the principal's office as distinguished from the permanent personnel file in the superintendent's office.

This letter should serve as notice of the agreement of Mary Hodge and her representative Richard M. Cornstuble of the ISTA/NEA to extend any contractual timelines for the notification of Ms. Hodge concerning the cancellation of her permanent contract with the North Montgomery schools. The timelines in question are contractual timelines and not those specified under I.C. 20-6.1-4-11 or related statutes commonly called P.L. 110.

78. Walker, the Association president, met with the superintendent at the latter's request on March 29, 1999. At that meeting, the superintendent informed Walker of his conversation with Cornstuble. Walker indicated that the Association would be representing Hodge in the future. The discussion involved an emotional issue which could destroy the Association because of its limited resources; however, the Association would commit everything to Hodge's defense. Also mentioned in the discussion was the alleged personal vendetta Sowers had against Hodge due to her knowledge of Sowers' personal life and that pursuing this matter could result in ruining Sowers' marriage and his career. According to Walker, the meeting with the superintendent was Walker's first awareness that Hodge was in jeopardy of losing her teaching job.

79. Shortly after that meeting, the superintendent sent the following letter to Hodge:

I am in receipt of the letter prepared by Richard M. Cornstuble, ISTA UniServ director, agreeing to extend any Master Contract time lines for providing you notification of any intent to cancel your indefinite (Regular Teacher's) contract with the North Montgomery Schools. Should the Corporation decide to pursue cancellation of your teaching contract, it will adhere to the time lines outlined in I.C. 20-6.1-4-11.

On Monday, March 29, 1999, I met with John Walker [Association] President, to discuss the procedures related to the possible cancellation of your contract. At that meeting Mr. Walker indicated that the [Association] would be representing you in this matter. Mr. Walker also stated that it was not necessary for me to meet with you in person prior to April 1.

80. A parent complained on March 30, 1999. According to this parent, his daughter was a member of the National Association for Gifted Children when she was home schooled and receiving A's in math. Under Hodge, she had been receiving C's. In addition, his daughter had been in Saxon math for years, and the teacher never taught a mere five (5) or ten (10) minutes but taught the students until they understood. Furthermore, the parent did not feel Hodge should be bringing her personal problems to the classroom. The parent was meeting with Hodge the next day and sought a meeting with the assistant principal after that appointment.

81. On March 31, 1999, Hodge met with the above-mentioned parents concerning their daughter. Following Hodge's parent conference, the parents met with Sowers and the assistant principal regarding their daughter's performance in Hodge's math class. In a memo to Sowers and the assistant principal, the parents presented a plan to collectively resolve their daughter's math

grade. On the same day, Sowers held a parent conference from 5:30 to 6:45. According to the parent, Hodge did not teach, expected the students to learn on their own, and spent too much time on the internet. The parent questioned what coloring eggs had to do with math and complained that his son had no respect for Hodge.

82. Following the parent conference, Sowers went to Hodge's classroom to set up a meeting for the next morning. Hodge said she had students coming in for a make-up test before school and could not meet. Sowers would not meet with her during the day. Hodge and Sowers agree that the discussion centered primarily on parent complaints. Sowers preferred that Hodge not meet with parents; that she should refer the parents to him. Sowers told Hodge he would just draft line item complaints the following day and provide her with a copy. No one mentioned having a representative at that time. Sowers did not conduct an investigation, nor did he interrogate Hodge.

83. At 7:30 a.m. on April 1, 1999, Hodge e-mailed the following to the Association president:

> **Michael came in my room last night around 6:30 and said he needed to meet this a.m. about parent complaints. I had a make-up test scheduled with two students at 7:15 and couldn't meet. He said if parents contact me and want to meet that I have to refer them to the office so they can go through him?! He also said he couldn't tell me who or what the complaints were at this time. He would hold off until after spring break but will not be able to tell me who the parents are then either. I think he likes the stress game.**[12]

84. Walker responded with the following e-mail to the superintendent:

> **I received this from Missy this morning. It appears to the [Association] that Mr. Sowers is trying to harass and intimidate her by these threats. Does he need the secrecy so he can manufacture this information? Whatever he has needs to be discussed in the open with me present. Missy has cooperated with Mr. Sowers at every turn, even agreeing to a self-improvement plan that he has no right to implement or enforce because there is no provision for it in the contract. These are grievable offenses. I feel these items show the discrimination exhibited toward Missy Hodge. I want everything open and honest, and I want an end to the harassment immediately. Thank you!**

85. On April 1, 1999, Sowers prepared a report of parent complaints, conferences, and letters. He prefaced the report with:

> **As per our short conversation on Wednesday, March 31, 1999[,] these are the main ideas, in line item form, of the 11 parent/student conferences and/or letters I have received since our last conference on March 12, 1999. The concerns expressed**

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[12] Corrected editorially

below are very much like the other concerns I have received throughout this year. I do not need to have a conference with you in [regard] to these concerns.

86. According to Hodge's Performance Improvement Plan ["Plan"], dated June 16, 1999, she did not show for a meeting planned for April 2, 1999. However, no letter or memorandum indicated a meeting for that day.[13]

87. Hodge did not receive the April 1 report of parent complaints, conferences, and letters until after spring break, approximately April 12, 1999.

88. Sowers received a parent complaint on April 12, 1999, which had been drafted on March 31, 1999. This parent was concerned about improper teaching methods and her child's struggle to understand the math concepts.

89. On April 12, 1999, Sowers sent a letter to Hodge setting a meeting for April 16, 1999, at 3:30 p.m. to discuss her evaluation. As in the past, Sowers invited the presence of an ISTA representative as well as an Association representative.

90. On April 13, 1999, another parent complained about the lack of teaching in Hodge's math class and the necessity of spending at least an hour each evening helping his child with homework because his child did not understand it.

91. On April 15, 1999, the Association and Hodge served the Corporation with an unfair practice which the Indiana Education Employment Relations Board ["IEERB"] received on April 16, 1999.

92. Sowers sent a memorandum to Hodge on April 15, 1999, postponing the April 16, 1999, evaluation meeting. A copy was provided to the ISTA representative and the Association president.

93. On April 16, 1999, the superintendent prepared the following letter:

You are hereby notified that the Board of School Trustees of North Montgomery Community School Corporation will meet in regular session on Monday, May 24, 1999, at 7:00 P.M., at North Montgomery High School, US 231 North, Crawfordsville, Indiana, to consider cancellation of your indefinite teaching contract.

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[13] This could represent a typographical error because Sowers attempted to meet with Hodge on April 1, but Hodge had scheduled make-up tests for that morning when Sowers wanted to meet.

> **The procedure to be followed and the rights accorded are stated in IC 20-6.1-11, a copy of which will be given to you upon request.**
>
> **If you request, a written statement of the reasons for the consideration will be furnished within five (5) days. You may also file a written request for a hearing within fifteen (15) days following your receipt of this notice.**
>
> **Failure to request a hearing within the above-specified time frame will result in a waiver of any right to a hearing.**

The letter was never delivered to Hodge.

94. Hodge was again observed in the classroom on April 19, 1999. On that same day, Sowers sent a memorandum to her scheduling May 3, 1999, for a meeting concerning her teaching status and evaluation. He would arrange for a substitute teacher beginning at 1:20 p.m.

95. Another classroom observation took place on April 21, 1999.

96. President Walker notified the superintendent on April 22, 1999, that the Association would be interested in viewing all materials contained in Hodge's personnel file. By separate letter on the same date, Walker advised Sowers that Michael C. Kendall of the Kendall Law Office would be representing the Association and that he would be contacting Sowers concerning Hodge.

97. On April 29, 1999, Sowers sent a memorandum to Hodge reminding her of the May 3, 1999, meeting concerning her teaching status and her evaluation. He informed her that the meeting would be held in the central administration office at 1:40 p.m. Nothing in the record indicates that this meeting occurred on that date.

98. In a letter to Walker, dated May 10, 1999, the superintendent outlined the dates of the evaluations contained in Hodge's personnel file. At that time, no other material was in her file.

99. Sowers completed Hodge's evaluation on or about May 11, 1999. Present at the May 11 evaluation meeting were the superintendent, the assistant superintendent, the assistant principal, Sowers, the Association president, and Hodge. Sowers recommended that Hodge be placed on conditional status for the 1999-2000 school year. He added:

> **You are [hereby] placed on notice that your job is in jeopardy. This coming school year, 1999/2000[,] there must be substantial and sustained improvement or I will recommend the termination of your employment.**

Both Hodge and Sowers signed the evaluation on May 11 as a reflection of the report's content.

100. A parent complained on May 13, 1999, about a misreported grade on his daughter's report card. On May 19, 1999, another parent complained about Hodge not "doing her job."

101. Walker and Hodge submitted a rebuttal to her evaluation on May 21, 1999.

102. By letter dated May 26, 1999, a parent raised several concerns. Among those was a failure to distribute yearbook order forms. Hodge allegedly did not teach new material and became defensive when questioned. The parent's daughter complained that Hodge spent too much time in front of the computer addressing invitations and conducting personal business. According to the student, Hodge frequently did not relay announcement news.

103. The following letter was signed by Sowers and hand delivered to Hodge on June 3, 1999:

> **As you know, your most recent evaluation was completed on May 11, 1999. This evaluation documented a number of deficiencies in your teaching performance and resulted in a recommendation that you be placed on a conditional contract for the 1999-2000 school year, thereby placing your continued employment with the School Corporation in jeopardy. Please be advised that you will be placed on a performance improvement plan for the 1999-2000 [school year] in an effort to provide you with assistance and guidance to remedy the deficiencies identified in your evaluation. It is my hope that we work together cooperatively to develop a performance improvement plan for you. A copy of a draft improvement plan is enclosed with this letter for your review and input.**
>
> **I would like to meet with you and your representative to review the proposed plan and discuss any changes or revisions, as appropriate. I am available to meet with you and your representative on the following dates: .... I would appreciate it if you would confer with your representatives and let me know at your earliest convenience which of these dates are appropriate for you.**
>
> **You must understand that you are in a job jeopardy situation, given my recommendation that you be placed on a conditional contract for the 1999-2000 school year. Please do not hesitate to contact me if you have any question about this correspondence or the enclosed documents.**

104. The Plan began with Wes Hammond's identification of performance concerns regarding Hodge for the 1998-99 school year. Those concerns included, but were not limited to, Hodge's preferential treatment of certain students, failure to provide adequate explanations and instructions to students, late arrival to class, extra credit assignments, and administration of personal medication. The Plan itself listed a goal and outlined strategies for the following categories: The Teaching and the Learning Atmosphere, The Teacher Interacting with People, The Teacher as a Professional, Classroom Management/Condition, and Teaching Competency. Parent complaints were utilized in formulating the Plan. The Plan concluded with a schedule of dates for observations and progress assessment meetings for the 1999-2000 school year. The Plan also addressed accommodation issues under the Americans for Disability Act ["ADA"].

105. Sowers sent the following memorandum regarding parent complaints to Hodge on June 10, 1999:

> **I attempted to call you three times this morning in [regard to] parent letters. I have copied them and will keep them in my office. I would request that you contact me to let me know when you will be coming to view them. I do not want them taken from the office area and would request your professionalism in [regard] to discussion of these outside the office.**

106. A meeting concerning the Plan was held on June 16, 1999, at which time Hodge signed the report.

107. The IEERB received the Complainants' amended complaint on June 22, 1999.

108. The parties' contract provides for advisory arbitration of grievances. At no time did the Association file a grievance on Hodge's behalf.

109. On February 2, 2000, the Hearing Examiner granted Complainants' Motion for Leave to File Supplemental Pleading, the substance of which follows.

110. On or about January 4, 2000, the IEERB issued a press release announcing a public hearing in the above-captioned case to be held on Tuesday, January 11 and Wednesday, January 12, 2000.

111. On or about January 7, 2000, several mentioned to Hodge the radio announcement about the public hearing for a "former" teacher. Believing the Corporation had provided the information to the radio station, Hodge walked to the office to speak with Cronk or the assistant principal; but they were unavailable. She proceeded to the office lobby where the school secretary noticed Hodge was crying and inquired as to why she was so upset. Hodge also had a substitute teaching form to submit. When Hodge said she needed to talk to Cronk and/or the assistant principal, the secretary reported that they were in conference. After Hodge returned to the classroom sometime after 10:00 a.m., the secretary notified Cronk and the assistant principal that Hodge needed to see both of them and appeared upset.

112. Prior to Cronk speaking with Hodge, she telephoned the superintendent about the radio announcement and the emotional state of Hodge. Cronk pulled Hodge out of the classroom and into another room to counsel her. According to Cronk, Hodge was very emotional and crying. Cronk assured Hodge that the Corporation had not released any information to the radio station.. . that she had already spoken with the superintendent who had heard the same radio announcement. Much of the conversation centered on Hodge's questioning her being the center of the public hearing with Cronk merely informing her that the matter was in Hodge's hands ... that the Corporation was the "defendant." Cronk never told Hodge to drop the complaint, but she did tell Hodge that "the ball was in her court." Cronk was satisfied that Hodge could return to the classroom.

113. Not knowing Cronk had spoken with Hodge, the assistant principal approached Hodge following lunch. They talked in the teacher's lounge. According to the assistant principal, Hodge was crying most of the time they were talking. As with Cronk, Hodge could not understand why the case was going forward. The assistant principal informed Hodge that she probably was the only one who could withdraw the complaint since she was the one who filed.

114. Neither Cronk nor the assistant principal threatened Hodge. Nor did either make a promise to Hodge if she would withdraw her complaint. Both acted in the capacity as personnel counselors to an emotional teacher.

115. At no time during the conversations with Cronk or the assistant principal did Hodge request a representative.

Issues

I. Did the Corporation commit an unfair practice by refusing Hodge union representation?

II. Did the Corporation deny Hodge due process by evaluating her teaching performance through parent complaints and, therefore, commit an unfair practice in violation of the collective bargaining agreement and the Act?

III. Did the Corporation commit an unfair practice when it enforced an improvement plan on Hodge purportedly in violation of the collective bargaining agreement and in violation of the Act?

IV. Did the Corporation violate §7(a)(4) of the Act when Principal Cronk and the assistant principal spoke with Hodge about the unfair practice?

Discussion

I.

The Association contends that the Corporation committed an unfair practice by failing to provide Hodge with a representative on at least three occasions. The first occasion allegedly occurred on October 21, 1998, concerning her evaluation; the second involved a request for family illness and an attendant meeting in the copy room on March 12, 1999; the third claimed occurrence

as March 31, 1999, when Sowers came to Hodge's room after school hours.

The paucity of IEERB case law in this area is demonstrative of school corporations and teacher unions respecting the rights of school employees who find themselves in a disciplinary situation.[14] In Fort Wayne Community Schools, 1977 Ann. Rep. 254, the principal sent a written notice to a teacher to appear in the principal's office at 2:44 p.m. on May 10, 1977. The teacher requested through the Fort Wayne Education Association ["FWEA"] representation for that meeting. The FWEA sent two representatives. The principal refused to allow the representatives to enter the meeting. The principal had announced that the purpose of the meeting was to mediate a dispute between two teachers, not for disciplining the two teachers.

According to the hearing examiner:

> **The issue is whether or not [the teacher] had the right to have a union representative present during her meeting in the [p]rincipal's office. The test is clear. '[T]he employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action.' National Labor Relations Board v. J. Weingarten, [88 LRRM 2689] 420 U.S. 251, 95 S.Ct. 959 (1975). However, the employee's reasonable belief must be based on objective standards-not merely on the employee's subjective standards.**

Id. at LRRM 2691. The hearing examiner held that since the purpose of the principal's meeting was not disciplinary, as announced in advance by the principal, and that no discipline would result, the function of mediating a dispute between two teachers was an administrative function; therefore, the teacher was not entitled to union representation and no unfair practice was committed.

In Weingarten, management interviewed an employee during the course of investigating charges that the employee had stolen from the store. While the employee requested the presence of a union representative during the interview, that request was denied. The Supreme Court held:

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[14] Another compelling reason can be found in Weingarten, infra at 21. The basic principles in Weingarten clearly define the administrative parameters of union representation in disciplinary actions. As a result, most school administrators and union representatives know exactly how Weingarten should be applied in the day-to-day operation of the school.

> **The action of an employee seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of §7 that ' [e]mployees shall have the right . . . to engage in ... concerted activities for the purpose of... mutual aid or protection.'[15] (citation omitted) This is true even though the employee alone may have an immediate stake in the outcome; he seeks 'aid or protection' against a perceived threat to his employment security. The union representative whose participation he seeks is however safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. (footnote omitted) The representative's presence is an assurance to other employees in the bargaining unit that they too can obtain his aid and protection if called upon to attend a like interview.**

Id. at LRRM 2692.

The basic Weingarten principles defining the scope of the right to union representation are:

- The right of an employee to union representation only arises in situations where the employee *requests* such representation.[16] The employer has no duty to inform the employee of the right. An employee need not adamantly insist on union representation; however, silence may be construed as a waiver. There is no right to a specific union representative if that representative is unavailable. The employee has a right to consult with his or her representative before an investigatory meeting, if requested by the employee or representative.

- The right to representation applies only in situations where an employee reasonably believes the investigation will result in disciplinary action or place the employee's job in jeopardy. The right to representation arises when a significant purpose of the meeting is to obtain facts to support disciplinary action. A meeting called simply to announce a decision to take disciplinary action or to "voice complaints" about the

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[15] *Cf.* §6, the relevant part of the Act which parallels the federal statute:

> **School employees shall have the right to form, join, or assist employee organizations, to participate in collective bargaining with school employers through representatives of their own choosing, and to engage in other activities, individually or in concert for the purpose of establishing, maintaining, or improving salaries, wages, hours, salary and wage related fringe benefits, and other matters as defined in sections 4 and 5 of this chapter.**

[16] The employee has a right to consult with his or her representative before an investigatory meeting where an employee might reasonably fear the result could be discipline, if requested by the employee or representative. Climax Molybdenum Company, 227 NLRB 1189 (1977)

employee's performance does not trigger the right to representation. The employee is not entitled to representation if he/she is assured that no disciplinary action will result from the interview. Whether or not the employee is entitled to a union representative, the employee may not be disciplined or discriminated against solely because of making the request.

- The exercise of the right to representation may not interfere with legitimate employer prerogatives.

- The employer may choose to carry on its inquiry without interviewing the employee. In any event, it is not within the employee's right to refuse an order to report to a supervisor's office.

- The employer has no duty to bargain with the representative who attends the interview.

Sowers met briefly with Hodge on October 21, 1998, to review with her the most recent evaluation. Because of the evaluation and the potential for initiating due processor job jeopardy, Sowers advised Hodge that she might want representation. She accepted that advice, and the meeting was postponed until October 27, 1998. Not only did Sowers give advance notice to Hodge that her job might be in jeopardy, he also recommended that she have a representative present.[17] Therefore, the October 21, 1998, meeting did not violate Hodge's Weingarten rights.

Critical to whether or not an employee has been denied the right to representation is that the employee reasonably believes the investigation will result in disciplinary action or place the employee's job in jeopardy. The confrontation in the workroom on March 12, 1999, was not an investigation. Sowers was merely performing an administrative function pertaining to usage of a family illness versus personal day. The reasonable belief must be objective. Hodge could not have reasonably believed the investigation would put her job in jeopardy because she knew that the confrontation concerned whether the day would be one of family illness or personal, not discipline. Another critical element in determining whether or not an employee was denied union representation is whether that employee requested representation. Here, Hodge never requested representation. As a result of failing to request representation and lacking a reasonable belief that the confrontation would result in discipline or job jeopardy, the Corporation did not violate Hodge's Weingarten rights.

On March 31, 1999, at approximately 6:45 p.m. Sowers went to Hodge's room to set up a meeting for the following day. Both Hodge and Sowers agree that the issue was the scheduling of a meeting pertaining to parent complaints. Again, Hodge lacked a reasonable belief that the discussion after school would result in discipline or place her job in jeopardy. She knew that the conversation centered on *scheduling a date* to discuss parent complaints. The discussion was not an investigation but merely an attempt to schedule an informational meeting regarding parent complaints. Once

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[17] Clearly, under the facts of this case, Sowers had no duty to advise Hodge of her right to representation.

more, Hodge did not request a representative. Hence, the Corporation did not violate Hodge's Weingarten rights.

II and III[18]

The Association first contends that the Corporation denied Hodge due process by evaluating her teaching performance through parent complaints. Second, the Association contends that the Corporation committed an unfair practice when it enforced an improvement plan on Hodge. In both instances, the Association argues that the Corporation violated both the Act and the collective bargaining agreement.[19] The Corporation's principle argument is that no unfair practice can occur where solely an individual grievance is alleged.

The Corporation's argument is key to determining whether further discussion is needed. Clearly, due process and the use of parent and student complaints in evaluating teachers is a subject of §5 discussion under the Act. In addition, the evaluation process as it affects all teachers in the bargaining unit is a subject of §5 discussion under the Act. However, in the present case both contentions pertain to only one teacher--Hodge.

The court in Carroll Consolidated School Corporation, 439 N.E.2d 737 (Ind. App. 1982) sought to clarify the scope of the §5 discussion mandate. After adopting the court's earlier interpretation of §5 set forth in Delphi Community School Corporation, 368 N.E.2d 1163 (Ind. App. 1977), the court stated:

> **"'Section 5 of the Act clearly contemplates that the discussion of the factors enumerated therein are to be on behalf of all members of the school employees' bargaining unit.' 368 N.E.2d at 1168. We agree."**

Carroll at 739. The court continued to articulate its interpretation of the scope of the §5 discussion mandate:

> **Discussion under Section 5 contemplates the mutual exchange of points of view regarding general conditions or overall guidelines applicable to, insofar as here pertinent, the 'selection, assignment or promotion of personnel.' (citation omitted) Although discussion of individual cases as *examples* may aid in examining policy,**

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[18] These issues are consolidated for purposes of composition.

[19] No rationale behind these contentions was proffered since the Association failed to file a timely brief.

> **there should be no obligation to discuss these individual cases before action is taken or to take an individual grievance to the discussion table. There is ample provision in the law for the establishment of a grievance procedure.** (citation omitted) (footnote omitted) (court's emphasis)

Carroll at 739.

The IEERB has resolutely adhered to the principles established in Carroll and Delphi. For example, *see* Decatur Township, U-82-31-5300, 1982 IEERB Ann. Rep. 394 (1983) where an individual school employee was not selected as the social studies department chairperson; Shakamak, U-84-41-2960, 1985 IEERB Ann. Rep. 115 (1985) where an individual school employee was not assigned or promoted to an extracurricular golf coaching position; Tippecanoe Valley School Corporation, U-85-18-4445, 1985 IEERB Ann. Rep. 98 (1985) where an individual, nonrenewed school employee's working conditions were changed to improve teaching performance; Blackford County School Corporation, U-87-09-0115,1987 IEERB Ann. Rep. 33 (1987) where an individual school employee sought to have an art show removed to Indianapolis and was issued administrative directives to be followed or face insubordination; Hanover Community School Corporation, U-9424-4580, 1995 IEERB Ann. Rep. 165 (1995) where an individual school employee sought to have her retirement resignation rescinded; and Marion Community Schools, U-93-39-2865, 1997 IEERB Ann. Rep. 101 (1997) where a teacher was presented with a remediation plan which extended an April 25 deadline, established in school board policy pertaining to evaluation, to June 1.

Clearly, Hodge was the only actor in a one-act play. Most of the rhetorical paragraphs in the amended unfair practice complaint focus strictly on the individual grievance pertaining to Hodge alone. The Prayer for Relief reinforces the individual nature of the complaint:

> **WHEREFORE, the Petitioners respectfully pray that the Board [o]rder the Respondent to cease and desist from committing an[y] further unfair labor practices upon the Petitioner, Ms. Hodge, and for all other applicable relief as provided for by law, as the Respondent has knowingly and willingly violated *specific terms and conditions of the Master Contract Between the Board of Education of the North Montgomery Community School Corporation and the North Montgomery Teachers Association.*** (emphasis added)

In the present case, no evidence emerged which would convince this Hearing Examiner that evaluating Hodge's teaching performance through parent complaints and enforcing upon her an improvement plan affected any other bargaining unit member. The evaluation procedure that was followed had been discussed with the Association. The procedure provided for a "conditional status" contract for those teachers in job jeopardy. By inference, "conditional status" contemplates an improvement plan short of termination as a last chance. Hence, no failure to discuss under Evansville-Vanderburgh can be lodged against the Corporation.

Again, Carroll certifies that "[t]here is ample provision in the law for the establishment of a grievance procedure." The court then refers to §2(o) of the Act which sets forth the discussion obligation and further protects individual employees with the following right:

> **"Neither the obligation to bargain collectively nor to discuss any matter shall prevent any school employee from petitioning the school employer, the governing body, or the superintendent for a redress of the employee's grievances either individually or through the exclusive representative, ..."**

Here, Hodge filed no grievance protesting the enforcement of an improvement plan or the use of parent complaints for evaluation purposes, thereby exercising her right under §2(o) of the Act.

IV.

Under §7(a)(4) of the Act, "[I]t shall be an unfair practice for a school employer to: discharge or otherwise discriminate against a school employee because he has filed a complaint, affidavit, petition, or given any information or testimony under this chapter."

The Association claims that a violation of the Act occurred when Principal Cronk and the assistant principal discussed the unfair practice, and the events surrounding the complaint, with Hodge on January 7, 2000, prior to the January 11, 2000, hearing. According to the Corporation, the Complainants have failed to meet their burden of proving an unfair practice of discrimination occurred referring to SSU Federation of Teachers, Local 4195 v. Madison Area Educational Special Services Unit, 656 N.E.2d (Ind. Ct. App. 1995) applying McDonnell Douglas Corporation v. Green (1973), 411 U.S. 792, 93 S.Ct. 1817 and Texas Department of Community Affairs v. Burdine (1981), 450 U.S. 248, 109 S.Ct. 1775. Madison SSU had been accused of committing unfair practices against a teacher when it transferred him because of his union activities. According to the court, "McDonnell Douglas and Burdine apply when the employer's proffered reasons for disparate treatment of the employee are claimed to be merely a pretext
for discrimination." Summarizing the McDonnell Douglas standard, the Court stated:

> **First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the-defendant were not its true reasons, but were a pretext for discrimination.**

Burdine at 450 U.S. 252-53.

Neither Hodge nor the Association were able to show by a preponderance of the evidence that she was the subject of discriminatory treatment. According to the record, Hodge learned that she was the subject of a radio announcement which led listeners to believe that she had been terminated. Upset, she sought counsel with Principal Cronk and the assistant principal. Both were in conference at the time she spoke with the school secretary. Upon hearing about Hodge's emotional state, Principal Cronk went to Hodge's classroom to speak with her. Later, the assistant principal spoke

with Hodge about the radio announcement. Neither Principal Cronk nor the assistant principal threatened Hodge or promised her anything. Furthermore, neither took any action with respect to the conversation. Both comforted a distraught teacher and answered her questions. Hence, the first test wherein the Complainants had "the burden of proving by a preponderance of the evidence a prima facie case of discrimination" must fail. Since the Complainants failed to meet their burden of proof, the Corporation did not commit a §7(a)(4) violation of the Act.

Conclusions of Law

1 . The Indiana Education Employment Relations Board has jurisdiction over the parties and the subject matter in dispute.

2. The Corporation did not refuse Hodge union representation and thereby commit an unfair practice.

3. The Corporation did not deny Hodge due process by evaluating her teaching performance through parent complaints and, therefore, committed no unfair practice because Hodge's claims regarding evaluation through parent complaints were individual grievances; therefore, Hodge has no recourse under the Act with respect to those claims.

4. The Corporation did not commit an unfair practice when it enforced an improvement plan on Hodge since the improvement plan pertained to an individual grievance and, therefore, not actionable under the Act.

5. The Corporation did not violate §7(a)(4) when Principal Cronk and the assistant principal spoke with Hodge on January 7, 2000.

Pursuant to the Rules of the Indiana Education Employment Relations Board, and specifically Rule 560 IAC 2-3-21(a), this case is transferred to the Indiana Education Relations Board.

To preserve an objection to the Hearing Examiner's Report, a party must object to the Report in a writing that identifies the basis of the objection with reasonable particularity. Such writing must be filed with the Indiana Education Relations Board within fifteen (15) days after the Report is served on the petitioning party. See IC 4-21.5-3-29(c) and (d); 560 IAC 2-3-22 and 23.

Dated this 10th day of September, 2001.

Janet L. Land
Hearing Examiner

2001 SUPPLEMENT TO
CUMULATIVE INDEX TO
UNFAIR PRACTICE DECISIONS*

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OTHER APPELLATE CASES

In addition to the representation, unit determination, and unfair practice cases shown in the IEERB Case Histories, the following appellate cases have interpreted or are related to the Certificated Educational Employee Bargaining Act (Indiana Code 20-7.5-1):

Anderson, 416 N.E.2d 327 (Ind. App.1981).

Blackford Co.,F-84-03-0515, 519 N.E.2d 169 (Ind. App. 1988).*

Blackford Co., 531 N.E.2d 1182 (Ind. App. 1988).

Caston, 688 N.E.2d 1315 (Ind. App. 1997).

Crawford County, 734 N.E.2d 685 (Ind. App. 2000).

DeKalb Co. Eastern, 513 N.E.2d 189 (Ind. App.1987).

East Allen, 683 N.E.2d 1355 (Ind. App. 1997).

East Chicago, 422 N.E.2d 656 (Ind. App. 1981).

East Chicago, 622 N.E.2d 166 (Ind. App. 1993).

Eastbrook,, 566 N.E.2d 63 (Ind. App. 1990).

Fort Wayne, 443 N.E.2d 364 (Ind. App. 1982).

Fort Wayne, 527 N.E.2d 201 (Ind. App. 1988).

Fort Wayne, 569 N.E.2d 672 (Ind. App. 1991).

Fort Wayne, 585 N.E.2d 6 (Ind. App. 1992).

Fort Wayne, 977 F.2d 358 (7th Cir. 1992).

Gary, 332 N.E.2d 256 (Ind. App. 1975).

Gary, 512 N.E.2d 205 (Ind. App. 1987).

Hamilton Heiqhts, 560 N.E.2d 102 (Ind. App. 1990).

Indianapolis, 585 N.E.2d 666 (Ind. App. 1992).

Indianapolis, 679 N.E.2d 933 (Ind. App. 1988).

Jay, 527 N.E.2d 715 (Ind. App. 1988).

John Glenn, 656 N.E.2d 864 (Ind. App. 1995).

Linton-Stockton, 686 N.E.2d 143 (Ind. App. 1997).

Madison-Grant, 675 N.E.2d 734 (Ind. App. 1997).

Marion, 721 N.E.2d 280 (Ind. App. 1999).

Michigan City, 577 N.E.2d 1004 (Ind. App. 1991).

Monroe Co., 434 N.E.2d 93 (Ind. App. 1982).

Monroe Co., 489 N.E.2d 533 (Ind. App. 1986).

Mt. Pleasant, 677 N.E.2d 540 (Ind. App. 1997).

New Albany-Floyd Co., 724 N.E.2d 251 (Ind. App. 2000).

New Prairie, 460 N.E.2d 149 (Ind. App. 1983).

New Prairie, 487 N.E.2d 1324 (Ind. App. 1986).

North Miami, F-84-17-5620, 500 N.E.2d 1288 (Ind. App. Memo. Dec. 1986).*

North Miami, 736 N.E.2d 749 (Ind. App. 2000).

North Miami, 746 N.E.2d 380 (Ind. App. 2001)

Perry Twp,., 459 U.S. 37 (U.S. Sup. Ct. 1983).

Portage Twp., 567 N.E.2d 851 (Ind. App. 1991).

Prairie Heights,, 585 N.E.2d 289 (Ind. App. 1992).

Rockville, 659 N.E.2d 174 (Ind. App. 1995).

South Bend, 444 N.E.2d 348 (Ind. App. 1983).

South Bend, 531 N.E.2d 1178 (Ind. App. 1988).

South Bend, 655 N.E.2d 516 (Ind. App. 1995).

South Bend, 657 N.E.2d 1236 (Ind. App. 1995).

Tippecanoe, 429 N.E.2d 967 (Ind. App. 1981).

West Noble, 398 N.E.2d 1372 (Ind. App. 1980).

Whitley Co.,718 N.E.2d 1181 (Ind. App. 1999).

*Cases in which the IEERB was a party.